and lead to precedent that, while more narrow and fact-bound, would be more instructive in helping chart the further development of Constitutional rights.[14]

Thus, for Barzun and Gilbert the conflict avoidance doctrine of Constitutional law would serve as an important illuminating tool for hard cases. By stressing the need to evaluate particularized interests and individual harm, it would direct courts to consider the needs of the actual individuals involved in the litigation, as opposed to getting caught up in bigger-picture considerations. And by forcing such narrow factual analysis, the model can limit the uncertainty that might otherwise arise from courts attempting to apply indeterminate precedent. While Constitutional conflict avoidance has attractive components, however, it also contains certain jurisprudential assumptions which may not stand up to closer scrutiny, and reveal that the model may in fact increase, not decrease, the presence of ideological bias and legal uncertainty in hard cases.

III. Jurisprudential Assumptions of the Barzun-Gilbert Model

"Hard Cases"

From the start of Barzun and Gilbert's analysis, it is clear that many of their foundational assumptions parallel the assumptions found in the school of Legal Realism. For one, just as Barzun and Gilbert wish to restrict their conflict avoidance paradigm to "hard" Constitutional cases[15], Legal Realist analysis consciously focuses only on cases which have reached higher appellate review, evincing a heightened level of complexity.[16] For Legal Realists, what distinguishes these hard cases is that they are "rationally indeterminate", in the sense that "the available class of legal reasons does not justify a unique decision"[17], a classification that closely mirrors Barzun and Gilbert's own understanding of "hard" cases.[18]

Indeed, Barzun and Gilbert's first major assumption, even prior to the specific conflict avoidance analysis, concerns this delineation of "hard" cases from non-hard ones. Barzun and Gilbert spend little time exploring exactly *how* judges and courts might arrive at a determination

[14] *Id.*, at 41.
[15] *Id.*, at 17.
[16] Brian Leiter, "American Legal Realism," in *The Blackwell Guide to Philosophy of Law and Legal Theory*, W. Edmundson & M. Golding eds. 50, 53 (Blackwell, 2005).
[17] *Id.*, at 51.
[18] Barzun & Gilbert, *supra* note 1, at 8.

that a case is a hard case, apart from a brief gesture at notions of epistemic uncertainty.[19] There is no guidance on how courts might objectively arrive at a conclusion that a particular case implicates indeterminacy, and thus satisfies the label of a "hard" case. This task of delimiting "hard cases" is even more difficult because Barzun and Gilbert make both legal and *moral* indeterminacy prerequisites for finding a hard case.[20] The inclusion of this latter condition of moral indeterminacy might be a pre-emptive acknowledgment that many Constitutional law cases are not decided purely on legal grounds, but incorporate other political, social, and religious intuitions.

However, if it is difficult to clearly define a set of circumstances where the "demands of law" fail to yield an answer, it is even more difficult to see how courts may reliably decide that a case is also not resolvable by the "demands of justice".[21] Of course, one might fairly say that it will always be difficult to produce a complete, *a priori* definition of an amorphous concept like indeterminacy, which is by itself the subject of more than ample jurisprudential debate. In fact, this is a responsibility that Barzun and Gilbert specifically pass over, noting only that their project "does not depend" on arriving at a criterion for "hardness" and depends only on there being "a class of cases in which application of *whatever criteria the interpreter thinks proper* produces a hard case" (emphasis in original).[22]

This move on the part of Barzun and Gilbert is unsatisfying. One of the chief benefits of the Constitutional conflict avoidance model is presumably that it would force judges to shift their analysis from abstract ideological frameworks to the actual material concerns of the parties at hand. However, this view fails to grapple adequately with the potential for the hard case label to serve as an escape hatch of sorts. If one takes seriously the Legal Realist theory that judges often decide cases on the basis of individual idiosyncrasies[23], including political ideology, one can imagine judges who fear that their preferred side in a Constitutional case will lose under a more "mechanical" application of existing precedent suddenly deciding that a case is "hard" and that analysis must shift to the conflict avoidance model, where other factual considerations may give their more sympathetic litigant the advantage.

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[19] *Id.*
[20] *Id.*, at 8.
[21] *Id.*
[22] *Id.*, at 10.
[23] Leiter, *supra* note 16, at 54.

There are echoes here as well of Frederick Schauer's more Formalistic concerns about "decisional jurisdiction".[24] Prior precedent, especially in Constitutional cases where precedents are often declarations about the fundamental rights of citizens, can be viewed as constituting rules which foster at least some baseline of predictability. These predictable rules may be inadequate at capturing all potential subtleties of all potential future factual permutations, but, as Schauer notes, knowing beforehand that a predictable rule will be applied fosters wider social confidence in a decisionmaker's decisional process.[25] Barzun and Gilbert's belief seems to be that their conflict avoidance model limits uncertainty by allowing judges to rule purely on the facts at hand without feeling the need to shoehorn their decisions into alignment with indeterminate precedents. However, a system that grants decisionmakers the ability to stray from applying prior rules in favor of a narrow case-by-case factual focus actually creates more space for unpredictable judicial discretion in the decisional process.[26] While some uncertainty is indeed generated when new facts are made to fit into seemingly inapposite old law, even greater uncertainty is created by granting judges the ability to simply disregard or elide over such prior rules in the course of their factual determinations.[27] Relieving judges of the obligation to try and apply prior rules might thus have the effect of increasing, not decreasing, the indeterminacy present in difficult cases.

The presence of this increased decisional power also brings up further fundamental questions about how judicial interpretation of "hard cases" might actually function. For example, can a trial court or lower appellate court's decision, made either by explicit announcement or implicit analysis, that a Constitutional case is "hard" serve as a binding observation upon higher courts, or are higher courts free to simply restart and decide for themselves if a case is "hard"? What happens when the ideological idiosyncrasies of a Supreme Court majority line up in such a way that it is motivated to label a case "hard" to get around applying or extending precedent it does not like? These more procedural concerns seemingly do not concern Barzun and Gilbert, or are otherwise assumed unimportant on their part. However, they do raise serious questions about the workability of the conflict avoidance model in the real world, and suggests that giving judges

[24] Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 540 (1988).
[25] *Id.*
[26] *Id.*, at 540-41.
[27] *Id.*

the discretion to delineate "hard cases" from determinate ones does not eliminate uncertainty from judicial decision-making, and in many cases may actually increase it.

Particularized Harms

The first step in the actual conflict avoidance model, as discussed in Part I, involves courts ascertaining the "particularized" interests which one or both parties have had frustrated in the underlying incident. For Barzun and Gilbert, these particularized interests are individual to each case and must be distilled and distinguished from more wide-ranging rights or interests that the parties at hand believe to have been violated.[28] In the case of the gay couple who are refused service by a wedding florist, for example, the particularized interest analysis would focus only on the couple's frustrated ability to procure flowers for their wedding, and would exclude consideration of their more abstract interest in receiving equal treatment to straight couples in society.[29] Barzun and Gilbert seem to assume that it is a relatively trivial step for courts to "set broad interests aside, and focus on the particularized interests whose satisfaction the other party frustrated or threatened to frustrate."[30] However, as they acknowledge, in many cases it is possible to identify a number of implicated interests, some of them broad and some narrow and particularized.[31] Even if one assumes that judges will put aside their ideological proclivities to reliably distinguish broad from particular interests – no small assumption in and of itself – it seems that they will still be left in many instances with a "menu" of several particularized interests to choose from. There is nowhere in Barzun and Gilbert's model where they indicate that litigants will have any explicit duty, perhaps through certain pleading requirements, to specify which interests – particularized or otherwise – are most vital to them. This would them seem to grant judges the ability to decide for themselves what narrow interests *they* believe the litigants have seen frustrated.

In fact, there is no requirement that any of the parties have to even *agree* with a court's framing of their particularized interest. Barzun and Gilbert might argue that this encourages courts to take a more "objective" posture, as opposed to depending on the parties' subjective expression of their own preferences. However, it seems difficult to disentangle the presence of an

[28] Barzun & Gilbert, *supra* note 1, at 19-20.
[29] *Id.*
[30] *Id.*, at 22.
[31] *Id.*, at 42.

objective interest from the subjective intent of the parties; it would seem strange, especially in a narrow, fact-bound case following the conflict avoidance model, for the court to be adjudicating a conflict based on terms that neither party feels accurately captures their interest. This once again also opens up Barzun and Gilbert to the kinds of Legal Realist critiques outlined previously. If judges can decide what the interests at stake "really" are, there seems a likelihood that they will choose to frame the competing interests in a way that favors the side they are already predisposed towards.

This kind of choice is not an inconsequential one, since not all narrow interests are weighed equally in every case. As Barzun and Gilbert concede themselves, different factual circumstances on the ground will make certain narrow interests more compelling and probative as to the final outcome than others.[32] In the case of the gay couple and the florist, one might imagine a judge sympathetic to the florist deciding to frame the narrow interests at play as "the interest in having decoration at one's wedding" versus "the interest in avoiding the all-consuming fear that one will be condemned by God for facilitating sin." Conversely, a jurist sympathetic to the couple might decide the relevant interests are "obtaining flowers from the best, most conveniently located florist in the area" versus "not having to be the person who must physically arrange the floral display at the wedding in question." Neither sets of formulations seem to violate the rule against abstract interests. While one might claim this type of re-wording is mere semantic shuffling, one can see how the animating sentiments behind the different framings, if not the actual verbal content of the framing itself, might lead to judges reaching particular decisions.

The concerns about excessive "decisional jurisdiction" touched upon previously also have relevance here. As articulated by Schauer, the concern with allowing decisional jurisdiction is the much greater "possibility of variance" that it injects into a judge's final decision.[33] Although Schauer's analysis is directed mainly towards issues of statutory interpretation, important parallels may still be drawn to Constitutional cases. Just as too much decisional jurisdiction "undermines predictability by allowing the determination of any of several purposes"[34], so too would Barzun and Gilbert's particularized harm model generate uncertainty

[32] *Id.*, at 42-43.
[33] Schauer, *supra* note 24, at 541.
[34] *Id.*

by granting judges the discretion in so-called "hard" cases to decide for themselves the interests that are "actually" at stake. As noted above, this determination can presumably be made without even accounting for the stated preferences of either party, which would seem to grant a judge free-wheeling discretion to craft their own articulation of the actual interests. While in some cases we might be satisfied with a judge's discernment, this grant of jurisdiction also "increases the likelihood of erroneous determinations"[35] or determinations that are too easily influenced by individual biases. This is not to say that the existing paradigm, where judges in difficult cases presumably attempt to eke out legal or moral determinacy in potentially indeterminate circumstances, always yields desirable results that are free from ideological predilections. However, it may accord the legal system a greater sense of stabilization and freedom from the personal proclivities of decision-makers[36], in the same way a more rote application of a rule may be preferable to entrusting judges with making case-by-case determinations of what the rule is "really" getting at.[37]

In other words, it is true that a judge's own idiosyncrasies will always play a role in how the terms of a particular legal matter are framed, implicitly or explicitly, and that these framings will often tend to be more favorable to one side over another. Under the current status quo, however, there is an extent to which judges must pay some deference to how the litigants themselves choose to frame the terms of the debate, even if the debate makes reference to concepts – like "equal dignity" or "religious liberty" – that are difficult to express in concrete terms. The Barzun and Gilbert model, by allowing judges to impose upon a case their own view of the heart of the conflict, leaves room for even greater judicial discretion, giving space for biased decisionmakers to wholly reconstrue the dispute in a way that tilts the scales in one direction more heavily. It also opens up the possibility for judges to "hide" the true underpinnings of their analysis, allowing them to make ideologically influenced decisions while using the "particularist" framing as a convenient fig leaf. In the more traditional model of Constitutional litigation, big ideological issues are, for better or worse, often presented front and center and considered explicitly, giving greater public clarity as to the true "why" behind a decision.

[35] *Id.*
[36] *Id.*, at 542 – 43.
[37] *Id.*, at 541.

One final objection with regards to the particularized harm analysis concerns those cases where the "narrow interests" at the heart of the litigants' dispute are inextricably wound up with the question of the existence of a broader Constitutional right. Barzun and Gilbert concede that some cases that fall in this category exist, using abortion as an example of a case where the narrow interest – an individual's desire to terminate their pregnancy – cannot be adjudicated separately from the wider question of whether that interest can even properly *exist* under the Constitution.[38] One can easily imagine other cases that are similar in nature. For example, an immigrant who is being deported but believes they are entitled to the deportation protections of the DACA "Dreamer" program has an interest – avoiding deportation – that cannot be decided separately from the broader question of whether DACA is a Constitutionally valid program that does in fact create a valid interest against deportation for some individuals. Similarly, one of the several cases that eventually fell under the banner of *Obergefell v. Hodges*[39] arose out of a situation where a gay couple, married in one state which recognized gay marriage, found that the union was not recognized as valid in another state. Once again, the narrow interest of the individuals – being able to obtain a valid marriage license in their state of residence – could not be separated from the broader claim of whether a Constitutional right to have such a marriage nationally recognized existed. Barzun and Gilbert acknowledge of course that their abortion example is not the only exception, but still hold that "their existence does not condemn the principle."[40] From a purely philosophical perspective, that might be true; the existence of exceptions or edge cases in any model or theory does not necessarily invalidate its power with respect to a majority of cases. However, it seems a not-insignificant assumption to believe that a model that fails when applied to such high-profile, paradigmatic examples can still maintain wider viability. If Constitutional conflict avoidance cannot answer the "big" questions, as it were, it seems unlikely that courts would keep it around to apply only to the "smaller" questions. A more likely outcome is that courts, out of a sense of both public credibility and internal consistency, will hold fast to whatever "worked" before, which would seem to leave conflict avoidance out in the dust.

[38] Barzun & Gilbert, *supra* note 1, at 45-46.
[39] 576 U.S. 644 (2015).
[40] Barzun & Gilbert, *supra* note 1, at 46.

Avoidance Costs

The next step of the Barzun and Gilbert conflict avoidance analysis requires the courts to make an ex-ante inquiry into what steps the relevant parties to the litigation could have taken to avoid the conflict at hand. This step reifies many of the assumptions already covered above, chiefly that judges will be able to reliably, with minimal interference from their own idiosyncratic biases, determine the narrowest interests harmed by both parties and faithfully reason backwards from there. Of greater interest in this section is Barzun and Gilbert's attempt to parse out the effect of "dignitary harms", an acknowledgment on their part that in many of the kinds of cases that implicate deep Constitutional questions, the harms are not merely economic, but implicate vague yet real feelings about equality, respect, and other intangible values.[41] Under the banner of dignitary harms, Barzun and Gilbert focus particularly on "psychological harms", which arise when a certain course of action causes "emotional pain and anguish" to the acting party.[42]

Barzun and Gilbert assume that courts can simply borrow the "reasonable person" standard of torts to determine how much psychological harm a particular course of avoidance might have caused to an individual.[43] It is far from clear, however, that such a standard can be easily transplanted in that way, in part because it seems likely that a judge's ideological priors would heavily influence the extent to which they are willing to impute psychological harm to the parties in question. One can certainly imagine a judge unsympathetic to gay marriage – or at least, more sympathetic to parties asserting religious freedom claims – deciding that the psychological avoidance cost suffered by a florist when they tacitly participate in a gay wedding by assigning the job to a subordinate still outweighs the psychological harm the couple would have felt by having to take their business elsewhere. Barzun and Gilbert seem to believe that such fuzziness in the calculation of these "emotional sensitivities" would be no greater in a Constitutional law context than in torts.[44] While it is true that ascertaining psychological harm when determining, say, pain and suffering will always have ambiguity even in the realm of torts, the danger in the Constitutional context is that judges will be tempted to feel that the party they are already sympathetic to has suffered the worse psychological harm.

[41] *Id.*, at 27.
[42] *Id.*, at 23.
[43] *Id.*, at 29.
[44] *Id.*

Barzun and Gilbert try to get around this problem by positing that, in most cases, the psychological harms will "cancel out" between the parties, and that the cases in which one party's harm "clearly outpaces" the other will likely not meet the threshold to be considered a hard case anyway.[45] But it does not follow that a case will be legally or morally determinate – and thus not "hard" – simply because there appears on the surface to be differing levels of psychological harm. Barzun and Gilbert's conception of legal claims in this regard has strong similarity's to Joseph Raz's Interest Theory, which posits that the existence of a legal right can be predicated on the relative strength of an individual's interest in the matter.[46] It is this intuition that Barzun and Gilbert seem to be channeling when they say that unequal psychological harms will render a case determinate. If one party's psychological or emotional harm is clearly greater than the other, then that affected party would seem to have a greater moral interest in having their right recognized as the basis of a valid legal claim.[47] However, the utilitarian rebuttal to this theory notes that, when the weight of interests in one case favors establishing a particular duty, there is a "wave" effect, whereby the resolution of that legal claim then confers duties and rights on other parties as a kind of outward chain reaction or domino effect.[48] Thus, cases where the immediate parties have differing levels of psychological harms may still constitute a hard case, if there is legal indeterminacy about how the duties and rights of other parties are likely to be effected by a finding for one party.

Similarly, there is no need for one party's harm to "outpace" another for the decision to be subject to a judge's ideological priors. A judge who is predisposed to take claims of violation of religious liberty more seriously than claims of anti-LGBT discrimination may still acknowledge that a gay couple would have been psychologically harmed by avoidance. But that might not prevent them from succumbing to their biases and tipping the balance of harms in their mind just enough in the florist's favor. Again, it is no new observation to state that judges often bring their own personal opinions to bear when deciding the outcome of a case. What these objections do indicate is that the purported benefits of the conflict avoidance model are far from certain, and that the insistence that judges focus only on the concrete harms of the parties at hand does not guard against the ills that Barzun and Gilbert might hope it does.

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[45] *Id.*, at 29-30.
[46] Thomas Waldron, *Rights in Conflict*, 99 Ethics 503, 504 (1989).
[47] *Id.*
[48] *Id.*, at 508.

Comparing Avoidance Costs

The final step of the Barzun and Gilbert analysis is the briefest and seemingly least jurisprudentially complex. Having ascertained the particularized interests at harm, and the avoidance costs the plaintiffs would have incurred by pursuing those interests a different way, the courts should decide in favor of the party whose avoidance costs would have been higher.[49] This final step, however, seems to rest on perhaps the most fundamental of Barzun and Gilbert's assumptions, which is that courts and the legal system should, through this new decisional calculus, *discourage* least cost avoiders in Constitutional hard cases. That this should be the case is far from clear. Imagine that, during the Civil Rights movement, Rosa Parks decided to bring suit against the city of Montgomery following the infamous incident where she was asked to change her seat on a public bus. Say that the courts, after deciding the case to be "hard", decided that Parks' particularized interest of "not moving seats on the bus" could have been more easily met through avoidance than the city government's interest of "minimizing strife between passengers on a public accommodation". Would we say then that a decision which found against Parks would be just, or would constitute an acceptable message for the judiciary and society to send out to other similarly situated plaintiffs? Intuitively, the answer to that would be a resounding no.

Barzun and Gilbert might say that, under their model, the upside is that such a decision against Parks would not serve as "precedent" in the legal sense, and that the courts would be able to find in favor of another Parks-like plaintiff in another fact-bound case where the circumstances might be against the government's favor. But it is questionable how well the public would be able to internalize such legalistic line-drawing. A more likely outcome, it seems, is that similarly situated plaintiffs would see the decision as foreclosing on their highly similar claims, thus leading to an avoidance of the courts. Again, that may be Barzun and Gilbert's aim, to have vexing social questions resolved by means other than resorting to courts with unpredictable ideological leanings. If it is, Barzun and Gilbert fail to make such an argument explicitly, and instead seem content with a model which would discourage many least cost avoiders from pursuing their claims, no matter how symbolically significant.

[49] Barzun & Gilbert, *supra* note 1, at 30-31.

Applications

The final portion of Barzun and Gilbert's article retroactively applies their model to prior Supreme Court decisions which they identify as potential Constitutional "hard" cases. In the process of such application, they make further assumptions which serve to undermine the feasibility of the conflict avoidance model in the real world. One of the cases discussed is that of *Burwell v. Hobby Lobby*[50], a case in which the federal government stepped in as a party on behalf of individual Hobby Lobby employees attempting to reverse the company's policy of not covering certain contraceptives through its employee health insurance.[51] For Barzun and Gilbert, a benefit of the conflict avoidance model is that, in *Burwell* and similar cases, the court would be obliged to look past the government's role as a litigant, and instead inquire as to the particularized interests and costs of the actual employees themselves.[52] Barzun and Gilbert seem to believe that, at least in *Burwell*, such considerations might have led to a decision more favorable to the employees.[53] However, this ignores the possibility that in such cases, courts will actually be *more* inclined to take their judging role seriously when "important" parties like the federal government are able to step in and make the case that the court's decision will have wider implications that must be carefully considered. Instead of being more sympathetic, in cases like *Burwell* it may very well be the case that focusing solely on the parties with "particularized harm" make their concerns seem more trivial and easily dismissed.

Barzun and Gilbert also make that point, that, under their model, precedents made by courts would be limited in scope, and would be highly specific to the bespoke factual contexts of each dispute.[54] In other words, whether a gay couple can properly compel a florist or wedding cake baker to serve them might rely on whether or not easily accessible alternative vendors are nearby; if they aren't, the gay couple might prevail, but if there are alternatives at hand, the couple may lose.[55] In response to the objection that such narrow holdings do little to advance the development of workable precedent, Barzun and Gilbert posit that "over time", such cases "may settle into identifiable classes" that will be able to guide courts in future matters. This is in a way a display of faith in common law analysis, but fails to consider that, again, without a clear

[50] 573 U.S. 682 (2014).
[51] Barzun & Gilbert, *supra* note 1, at 32.
[52] *Id.*, at 33-34.
[53] *Id.*
[54] *Id.*, at 40-41.
[55] *Id.*

precedent to restrain them, judges will selectively analyze these narrow holdings in a way that is more susceptible to ideology than the average torts case might be. And there is no requirement or suggestion that, after a certain critical mass of narrow precedent has accumulated, that courts will or should be able to formulate a wider prospective rule that restricts the scope of decision-making in similar future cases. This is another arena where the Barzun and Gilbert model opens the door for judicial discretion. While it may be the case that the existence of broad Constitutional precedent is not ideal – especially in cases where one disagrees with the nature of the precedent – it means that we "give up some possibility of improvement in exchange for guarding against some possibility of disaster."[56] We might be unsatisfied with a hard and fast rule that seems to lack appropriate nuance to all possibilities, but we are likely to be even more unsatisfied by a paradigm which allows judges to craft their own rule on a case-by-case basis, borrowing selectively from precedent without even some of the small limitations which exist in the traditional framework.[57]

Another example considered by Barzun and Gilbert is the case of *Brown v. Board of Education*.[58] For Barzun and Gilbert, the conflict avoidance model would have still favored the plaintiffs in that case, primarily because "short of relocating to an integrated state", the plaintiffs could not pursue their interest in pursuing education in an integrated setting which did not impose the dignitary harms of making them seem like second-class citizens.[59] But what if the plaintiffs in that case lived on a state border, next to an integrated state and an integrated school district in that state which would have been happy to take them? Under the conflict avoidance model, it is at least conceivable that a court could have decided those plaintiffs' avoidance harms would have been lesser than the "harms" suffered by white students who would have been forced to create their own private schools to avoid the psychological distress of integration.[60] Not only would such a "narrow, fact-bound" holding in that case been deeply contrary to our sense of justice but, similar to the Rosa Parks example discussed above, it seems likely that it would have had a dampening effect on the desire of other black students to assert their rights.

[56] Schauer, *supra* note 24, at 542.
[57] *Id.*, at 541.
[58] 347 U.S. 483 (1954).
[59] Barzun & Gilbert, *supra* note 1, at 50-51.
[60] *Id.*

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The Honorable Jamar K. Walker
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Dear Judge Walker,

I am a rising third-year law student at Vanderbilt University Law School, where I am Senior Symposium Editor of the VANDERBILT JOURNAL OF ENTERTAINMENT & TECHNOLOGY LAW. I am very interested in being considered for a clerkship in your chambers for the 2024-2025 term. I have prepared myself for this opportunity through my participation in Moot Court, where my partner and I were given the Best Brief Award, and through my previous work in two different Judicial Chambers. Please find my resume, law school transcript, and writing sample. Letters of recommendation from the following individuals are included:

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Thank you for your time and for considering my application. I can be reached by phone at (423)963-1170 or by email at michael.j.bennett@vanderbilt.edu. Please let me know if there is any additional information I can provide.

Sincerely,

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LAW	6010	**Civil Procedure**	4.00	**B+**	13.20
Instructor:		Ingrid Wuerth			
LAW	6020	**Contracts**	4.00	**A-**	14.80
Instructor:		Owen Jones			
LAW	6030	**Criminal Law**	3.00	**B+**	9.90
Instructor:		Christopher Slobogin			
LAW	6040	**Legal Writing I**	2.00	**B+**	6.60
Instructor:		Elon Slutsky Jennifer Swezey Anvitha Yalavarthy			
LAW	6060	**Life of the Law**	1.00	**P**	0.00
Instructor:		Timothy Meyer Sara Mayeux			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	14.00	13.00	44.50	3.423
CUMULATIVE:	14.00	13.00	44.50	3.423

2022 Spring

LAW	6050	**Legal Writing II**	2.00	**A**	8.00
Instructor:		Elon Slutsky Anvitha Yalavarthy			
LAW	6070	**Property**	4.00	**B+**	13.20
Instructor:		John Ruhl			
LAW	6080	**Regulatory State**	4.00	**B+**	13.20
Instructor:		Lisa Bressman			
LAW	6090	**Torts**	4.00	**B+**	13.20
Instructor:		Edward Cheng			
LAW	7114	**Corporations**	3.00	**A-**	11.10
Instructor:		Randall Thomas			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	17.00	17.00	58.70	3.452
CUMULATIVE:	31.00	30.00	103.20	3.440

2022 Fall

LAW	5790	**Jrn'l Ent & Tech Law**	0.00	**P**	0.00
Instructor:		Daniel Gervais			
LAW	5900	**Moot Court Competition**	1.00	**P**	0.00
Instructor:		Susan Kay Kendall Jordan			
LAW	7000	**Administrative Law**	3.00	**A-**	11.10
Instructor:		Kevin Stack			
LAW	7017	**American Legal History II**	3.00	**B+**	9.90
Instructor:		Sara Mayeux			
LAW	7078	**Constitutional Law I**	4.00	**B+**	13.20
Instructor:		Matthew Shaw			
LAW	7164	**Employment Discrim. Law**	3.00	**B+**	9.90
Instructor:		Jennifer Shinall			
LAW	7421	**Labor Law: Entertainment**	1.00	**P**	0.00
Instructor:		Sarah Luppen			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	15.00	13.00	44.10	3.392
CUMULATIVE:	46.00	43.00	147.30	3.425

2023 Spring

Term Honor: Dean's List

LAW	5790	**Jrn'l Ent & Tech Law**	1.00	**P**	0.00
Instructor:		Daniel Gervais			
LAW	5905	**Moot Court Board Member**	1.00	**P**	0.00
Instructor:		Susan Kay			
LAW	7180	**Evidence**	4.00	**A-**	14.80
Instructor:		Garrick Pursley			
LAW	7470	**Local Government Law**	1.00	**A-**	3.70
Instructor:		Karl Dean			
LAW	7600	**Professional Respons.**	3.00	**A+**	12.90
Instructor:		Mozianio Reliford			
LAW	7905	**Externship-In Nashville**	3.00	**P**	0.00
Instructor:		Spring Miller			
LAW	8040	**Constitutional Law II**	3.00	**A-**	11.10
Instructor:		Sara Mayeux			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	16.00	11.00	42.50	3.863
CUMULATIVE:	62.00	54.00	189.80	3.514

---------- NO ENTRIES BELOW THIS LINE ----------

Date: 06/06/2023

Auburn University
152 South College St., Auburn, AL 36849

SSN:*****1990 Student No:903763327 Date of Birth: 16-JUL-** Date Issued:27-JUN-2022 OFFICIAL

Record of : Michael J Bennett

Issued To : MICHAEL BENNETT

Course Level : Undergraduate

Primary Program
Degree : Bachelor of Arts
Program : BA Political Science
College : College of Liberal Arts
Major:
Political Science

Secondary
Degree : Bachelor of Sci in Bus Admin
Program : BSBA Marketing
College : College of Business
Major:
Marketing

Degree Information:
Awarded: Bachelor of Arts 01-MAY-2021

Program : BA Political Science
College : College of Liberal Arts
Campus : Auburn Main Campus
Major:
Political Science
Dept. Honors:
University Honors Scholar
Inst. Honors:
Summa Cum Laude
Degree Information:
Awarded: Bachelor of Sci in Bus Admin 01-MAY-2021

Program : BSBA Marketing
College : College of Business
Campus : Auburn Main Campus
Major:
Marketing
Dept. Honors:
University Honors Scholar
Inst. Honors:
Summa Cum Laude

Subj	No.	Title	Cred	Grade	Pts	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
ADV PLACE		Advanced Placement Credit				
BIOL	1020	Principles Of Biology	4.00	S		
MATH	1130	Precalculus Trigonometry	3.00	S		
MATH	1610	Calculus I	4.00	S		
POLI	1090	Amer Gov In Multicul World	3.00	S		
STAT	2510	Stats For Bio And Health Sci	3.00	S		

Earned Hrs	GPA-Hrs	QPts	GPA
17.00	0.00	0.00	0.00

ADV PLACE		Advanced Placement Credit				
ENGL	1100	English Composition I	3.00	S		
ENGL	1120	English Composition II	3.00	S		

Earned Hrs	GPA-Hrs	QPts	GPA
6.00	0.00	0.00	0.00

ADV PLACE		Advanced Placement Credit				

Subj	No.	Title	Cred	Grade	Pts	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
FLSP	1010	Elementary Spanish I	4.00	S		

Earned Hrs	GPA-Hrs	QPts	GPA
4.00	0.00	0.00	0.00

Subj	No.	Title	Cred	Grade	Pts	R
INSTITUTION CREDIT:						
Fall 2017						
College of Liberal Arts						
Political Science						
COMM	1000	Public Speaking	3.00	A	12.00	
FLSP	1020	Elementary Spanish II	4.00	A	16.00	
HONR	1087	Honors Lyceum: Times on T uesday	1.00	S	0.00	I
MUSE	1100	Marching Band	1.00	A	4.00	
MUSI	2737	Honors Appreciation Of Music	3.00	A	12.00	
PSYC	2010	Intro To Psychology	3.00	A	12.00	
UNIV	1150	Special Topics with Learn ing Strategies: Pre-Law L earning Community	2.00	A	8.00	

Earned Hrs	GPA-Hrs	QPts	GPA
17.00	16.00	64.00	4.00

Dean's List
Good Standing

Spring 2018						
College of Liberal Arts						
Political Science						
ACCT	2700	Business Law	3.00	A	12.00	
BIOL	1010	A Survey Of Life	3.00	B	9.00	
BIOL	1011	A Survey Of Life Laboratory	1.00	A	4.00	
ENGL	2260	American Lit II after 1865	3.00	A	12.00	
HIST	1027	Honors World History II	3.00	A	12.00	
HONR	1087	Honors Lyceum: Global Iss ues	1.00	S	0.00	I
PHIL	1010	Introduction To Logic	3.00	A	12.00	

Earned Hrs	GPA-Hrs	QPts	GPA
17.00	16.00	61.00	3.81

Dean's List
Good Standing

Fall 2018						
College of Liberal Arts						
Political Science						
ACCT	2110	Prin of Financial Acct	3.00	A	12.00	
BUSI	2010	Professional Development II	1.00	A	4.00	
COMP	1000	Personal Computer Applications	2.00	A	8.00	
ECON	2020	Principles of Microeconomics	3.00	A	12.00	
HIST	1017	Honors World History I	3.00	A	12.00	
HONR	1087	Honors Lyceum: Times on T uesday	1.00	S	0.00	I
POLI	3000	Poli Sci Research Methods I	3.00	A	12.00	

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	15.00	60.00	4.00

Dean's List
Good Standing

Spring 2019						
College of Liberal Arts						
Political Science						

Karen Battye Auburn UniversityRegistrar

Auburn University
152 South College St., Auburn, AL 36849

SSN:*****1990 Student No:903763327 Date of Birth: 16-JUL-** Date Issued:27-JUN-2022 OFFICIAL

Subj	No.	Title	Cred	Grade	Pts	R

INSTITUTION CREDIT:

ACCT	2210	Prin of Managerial Acct	3.00	A	12.00
ECON	2037	Honors Prin Of Macroeconomics	3.00	B	9.00
MKTG	3010	Prof Dev in Marketing	1.00	S	0.00
MKTG	3310	Principles of Marketing	3.00	A	12.00
PHIL	1027	Honors Ethics	3.00	A	12.00
POLI	3090	Intro To Intnl Relations	3.00	A	12.00

Earned Hrs	GPA-Hrs	QPts	GPA
16.00	15.00	57.00	3.80

Dean's List
Good Standing

Fall 2019
College of Liberal Arts
Political Science

BUAL	2650	Business Analytics II	3.00	A	12.00
MKTG	4400	International Marketing	3.00	B	9.00
MKTG	4430	Business to Business Marketing	3.00	A	12.00
POLI	3020	Intro To Political Theory	3.00	A	12.00
POLI	3080	Model United Nations Honors	3.00	A	12.00
SCMN	2150	Ops: Mngt of Bus Processes	2.00	A	8.00

Earned Hrs	GPA-Hrs	QPts	GPA
17.00	17.00	65.00	3.82

Dean's List
Good Standing

Spring 2020
College of Liberal Arts
Political Science

MKTG	4330	Retail Management Honors	3.00	A	12.00
MKTG	4360	Marketing Research & Analytics	3.00	A	12.00
POLI	3250	Intro To Public Admin	3.00	A	12.00
POLI	3380	Evidence and Legal Reasoning	3.00	A	12.00
POLI	4040	Constitutional Law: Crim Law	3.00	A	12.00

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	15.00	60.00	4.00

Dean's List
Good Standing

Summer 2020
College of Liberal Arts
Political Science

FINC	3610	Principles Of Business Finance	3.00	A	12.00
POLI	3140	American Foreign Policy	3.00	A	12.00

Earned Hrs	GPA-Hrs	QPts	GPA
6.00	6.00	24.00	4.00

Good Standing

Fall 2020
College of Liberal Arts
Political Science

ISMN	2140	Intro to Mngt Information Syst	2.00	B	6.00
MKTG	4350	Services Marketing Honors	3.00	A	12.00
MNGT	3100	Principles Of Management	3.00	A	12.00
POLI	2100	State Government and Policy	3.00	A	12.00
POLI	4020	Constitutional Law Civil Libs	3.00	A	12.00

Subj	No.	Title	Cred	Grade	Pts	R

INSTITUTION CREDIT:

Earned Hrs	GPA-Hrs	QPts	GPA
14.00	14.00	54.00	3.86

Dean's List
Good Standing

Spring 2021
College of Liberal Arts
Political Science

MKTG	4410	Consumer Behavior Honors	3.00	A	12.00
MKTG	4800	Marketing Strategy	3.00	A	12.00
MNGT	4800	Strategic Management	3.00	A	12.00
POLI	4030	Constitution Law Civil Rights	3.00	A	12.00
POLI	5410	Southern Politics	3.00	A	12.00

Earned Hrs	GPA-Hrs	QPts	GPA
15.00	15.00	60.00	4.00

Dean's List
Good Standing
Last Standing:Good Standing

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	133.00	129.00	505.00	3.91
TOTAL TRANSFER	27.00	0.00	0.00	0.00

----------END OF TRANSCRIPT----------

Karen Battye Auburn UniversityRegistrar

UNITED STATES DISTRICT COURT
Eastern District of Tennessee

Cynthia Richardson Wyrick
United States Magistrate Judge

James H. Quillen U.S. Courthouse
220 West Depot Street, Suite 306
Greeneville, TN 37743

Telephone (423) 783-2575
FAX (423) 823-3036
E-mail cynthia_wyrick@tned.uscourts.gov

October 7, 2022

To Whom it May Concern

RE: Recommendation of Michael Bennett for Clerkship

Dear Sir/Madam:

I write in support of Michael Bennett's application for a clerkship position with your chambers. Michael interned with my chambers this summer. In that capacity, he integrated quickly and seamlessly into our chambers' team. During his internship, Michael received a broad overview of the federal court process from both a civil and criminal law perspective.

Michael frequently accompanied me into the courtroom to observe the proceedings. Outside of the courtroom, he provided research assistance and prepared memos for use by chambers in drafting opinions. He also provided significant assistance with helping sort through damages in a particularly unique civil case and on the criminal law front did a very nice job of addressing in a research memo the thorny issue of the intersection of biometrics and the 5th Amendment in the context of search warrants. Michael was genuinely enthusiastic about taking on any project we assigned him and the work product he provided in return was very good. In addition to completing written assignments, Michael participated in our chambers meetings where we discuss workflow and challenging issues in cases pending before the Court. Michael provided helpful comments while at the same time clearly being cognizant of his role as an intern. I found Michael's insight and analysis to be of a particularly high quality for someone who had just finished his first year in law school.

In addition to being exposed to the above, it was important to me that Michael receive an introduction to the other aspects of the federal court system. As such, I provided him with time to observe proceedings before both of District Court judges and arranged for him to spend a day learning about the inner workings of our Clerk's Office. As such, Michael now has a far better grasp than most law students on how the pieces to the federal court puzzle fit together.

While I am recommending Michael primarily because of his demonstrated ability to research and write at a high level and aptly analyze the law, there are strong secondary reasons for my recommendation as well. One of those is Michael's ability to be a team player. Given how few

of us there are in chambers, it is essential for me to have clerks and interns with whom I enjoy interacting and who will get along well with the other members of the team. As referenced above, Michael was just such a person, and we were truly sad to see him go at the end of the summer. The other reason is Michael's demonstrated commitment to serve the community and the profession. Given that there are so few law students who will have the opportunity to intern and/or clerk for the court system, when I choose who will serve in my chambers, I try always to consider who appears likely to use what they will learn during their time with the Court to ultimately make a difference for the legal system and the world at large. As you will see from Michael's resume, he has been giving back to his university and the community since his days as an undergraduate and quickly began doing the same for his law school and community once he arrived at Vanderbilt.

I expect to see Michael do great things in the coming years. Given his keen intellect, strong work ethic, and commitment to service, I can recommend him without reservation and am confident that he will make positive contributions to the work of your chambers from day one. In addition, Michael is indeed the type of person who will take the lessons he learns about the legal system during a clerkship and put them to work not just for himself but for the profession. Should you have further questions about Michael, please do not hesitate to reach out to me at (423) 783-2575.

Sincerely,

Cynthia Richardson Wyrick

Cynthia Richardson Wyrick
United States Magistrate Judge

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Michael Bennett for a clerkship in your chambers. Michael is a talented, hard-working, and gregarious student with excellent legal writing and advocacy skills. He will be a dedicated and highly effective law clerk.

Michael was my student in civil procedure during his first semester of law school. It is a difficult class. I "cold call" on a large number of students each day, and I know them well by the end of the semester. It is easy to discern who reads carefully, who is good at legal reasoning and analysis, and whose interest in law extends beyond preparing for the examination. Michael stood out in all of those ways. He was extremely well-prepared for every class session. From parsing the Federal Rules of Civil Procedure to mastering the complicated common law reasoning in personal jurisdiction cases, from complicated statutes to the various policy objectives behind the Erie doctrine, Michael proved himself capable of multiple kinds of legal reasoning and analysis. And in office hours he asked genuinely interesting questions about civil procedure, questions that ranged from litigation strategy to how to ensure a fair and efficient procedural system. He was, in short, a delight to teach for the same reasons that he will be a delight to have as a law clerk.

Many gifted law students and lawyers start out with a strong undergraduate education that prepares them for the profession. Michael has that good foundation for his career in law. He was an outstanding student at Auburn in political science, earning many awards and holding many leadership positions. He has a strong interest in voting rights, a cause for which he has been active in many different capacities both at Auburn and at Vanderbilt. He also has substantial experience in business-related contexts. Those two sets of experiences are evident when you meet Michael. He is professional and poised, yet he conveys a true interest in civic engagement and in the world around him. It is a great combination, one that should serve him well.

Finally, Michael's record at Vanderbilt makes him a very strong candidate for a clerkship. His grades do not put him at the top of the class, but he has performed very well in an extremely challenging intellectual environment. He earned an A, for example, in legal writing – a difficult grade to achieve in an extremely important class that is graded on a strict curve. Michael is a member of the Vanderbilt Journal of Entertainment and Technology Law, an honor that confirms his strong skills as a writer. His student note is on a very promising topic: sport arbitration. His working title is The Ball's in Your Court (and yours and yours): An analysis of the quasi-adjudicative systems used to resolve off-field conduct disputes across

professional sports leagues. He is comparing systems across different U.S. professional sports leagues, with a focus on transparency and due process protections for players. I think it is a great project: creative and interesting, yet very focused on law. He has advanced to the octo-final rounds of the Moot Court competition and is a finalist for the best brief award.
Finally, Michael worked as a judicial intern for a federal judge after his first year of law school. That position will prepare him well for a clerkship, and it also demonstrates his very strong interest in clerking.

Michael will be an excellent law clerk. He will hit the ground running with strong research and writing skills, and with prior experience working for a federal judge. You will benefit from his passion for the law, his intense work ethic, and his genuine interest in clerking. His application has my very strong support.

Sincerely,

Ingrid Wuerth
Helen Strong Curry Chair in International Law
Director, Cecil D. Branstetter Litigation & Dispute Resolution Program

Ingrid Wuerth - ingrid.wuerth@vanderbilt.edu - 615-322-2304

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Michael Bennett, a second-year law student at Vanderbilt Law School, for a clerkship in your chambers. Michael was a student in my Regulatory State course in Spring 2022. From the start, Michael set himself apart as a talented, engaged student. I believe he would be an asset to any chambers. I am pleased to provide this recommendation.

Michael was an excellent student in my Regulatory State course. Although the class was large, Michael distinguished himself among his classmates with his sharp mind and well-developed analytical skills. He was one of the few students willing to puzzle through the more difficult aspects of the caselaw, taking the necessary steps back to explore the gray areas that reveal no easy answers. He wrote a solid final exam.

Although I have not had the chance to read Michael's non-exam writing, I will note that he already has had the opportunity to develop his legal writing skills as in intern in the chambers of Judge Cynthia Wyrick on the U.S. District Court for the Eastern District of Tennessee. He will hit the ground running.

Outside the classroom, Michael has demonstrated an interest in legal issues and explored opportunities that will benefit him as a law clerk and lawyer. Of note, he is President of the Voting Rights & Advocacy Group in Nashville, which partners with the broader Nashville community. He has long been a vocal advocate for voting access, finding ways to make a difference to actual people whether in his home community, his undergraduate institution, or his current local community. He also been involved in the life of the law school, with journal membership, moot court participation, and leadership activities that broadly benefit all students and the school itself.

Michael is also a wonderful person. I admire his passion for government and the law. He indicated quite early into the semester last year that he intended to apply for a clerkship because he wanted to start his legal career better understanding the work of courts. I believe that he would be a welcome addition to your chambers, both dedicated to the law and enjoyable to be around. I hope that you will consider interviewing him for the position. If I may provide any further information, please do not hesitate to contact me. Thank you for your consideration.

Yours sincerely,

Lisa Schultz Bressman

Lisa Bressman - lisa.bressman@vanderbilt.edu - 615-343-6132

MICHAEL BENNETT – WRITING SAMPLE

NOTE: This has not been altered from the time of submission.

The following is an excerpt from my team's brief submitted for the Vanderbilt University Bass, Berry, & Sims Moot Court Competition. The brief won the "Best Brief" Award for the competition. The excerpted text represents my contribution to the brief. Not included are my partner's contribution and other collaborative sections. I will be happy to provide a copy of the full brief upon request.

I. 18 U.S.C. § 795 is sufficiently narrowly tailored to the achievement of a compelling governmental interest and thus survives strict scrutiny review.

18 U.S.C. § 795(a) provides that certain "vital military and naval installations or equipment," when so deemed by the President, may not appear in photographs without express consent from the installation's presiding officer. This statute is both construed and applied based on the compelling need to preserve strong national security interests. *See Snepp v. United States*, 444 U.S. 507, 515-16 (1980) (holding that the government maintains preemptive enforcement power regarding § 795 because of the inaccessibility of adequate retroactive remedies in court). The act of taking a photograph is subject to protection under the First Amendment, as are the other actions listed in § 795. U.S. Const. amend. I. However, these protections are not absolute. The government can regulate the time, place, and manner of the speech, so long as the regulation is not based on the content or subject matter of the speech, serves a significant governmental interest, and leaves open alternative channels for communication of the information. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

There is no dispute that § 795 is a content-based regulation; however, this does not end the inquiry. Rather, a rebuttable presumption of constitutional invalidity is created. *See R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). The presumption is overcome by a governmental showing of constitutionality, which is achieved by proving that the statute survives strict scrutiny review. *Id.; see also Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (subjecting restrictive regulations on speech to strict scrutiny). To survive strict scrutiny, § 795 must be narrowly tailored to the achievement of a necessary, compelling governmental interest. *Ashcroft*, 542 U.S. at 670. Because of the necessity and significance of national security as a compelling governmental interest, the narrow tailoring to achieve this interest, and the availability of adequately inclusive

alternative methods of communication, § 795 survives the Constitutional inquiry, complies with First Amendment protections, and should stand.

A. National Security is a constitutionally sound, sufficient, and necessary compelling governmental interest which justifies content regulation.

The Court has long regarded national security as a compelling governmental interest in statutory review. *See Snepp*, 444 U.S. at 515-16; *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting and applying the strong deference shown by courts on matters of national security); *Haig v. Agee*, 453 U.S. 280, 308 (1981) (confirming the right of the Secretary of State to revoke passports when a determination is made that the passport holder poses a likely threat to national security). This deferential regime exists for good reason. Issues of national security are uniquely specialized and require the highest level of discretion from a limited few. *See Snepp*, 444 U.S. at 515-16. Members of the Court, while subject matter experts in the statutes and common law of the country, are necessarily and intentionally not experts on the national security of the country. *See, e.g., Egan*, 484 U.S. at 518. The Court's charge is to come to reasoned decisions on the case or controversy that comes before it, while also maintaining a responsibility of transparency to citizens of the United States. Courts cannot and should not be asked to engage in the rapid decision-making required by issues of national security, nor should they be burdened with balancing interests of transparency and discretion.

In *Snepp*, the Court upheld a CIA post-work confidentiality clause that required Agency prepublication review of any item posted about work during the employee's service. *Id.* at 508. The Court found that the agreement and its enforcement constituted a regulation of content, establishing a presumption of invalidity. *Id.* However, the Court cited the significant impact on the CIA's efficacy in light of publications like Mr. Snepp's. *Id.* at 512.

While in this case the Court is confronted with a criminal statute and not a contractual dispute, the national security interest relied upon remains the nexus of the compelling governmental interest. *Id.* at 515-16; (D. Avellino at * 14.) The Court has been reluctant to interfere with the Constitutional powers of Congress and the President when it comes to the regulation and maintenance of national security. *See Egan*, 484 U.S. at 530. Here, the regulation is critical to the effectiveness of a functioning military based on the need to protect the confidentiality of military installations from adversaries. (D. Avellino at *14.) The government has a compelling interest in protecting the technological advancements within Air Base Avellino that promote a competitive advantage, just as a private business has an interest in protecting its innovations. *See generally O'Reilly v. Morse*, 56 U.S. 62 (1853) (emphasizing and clarifying the importance of intellectual property in the American system). Moreover, this compelling interest is only made stronger considering the widespread security implications of a potential breach. Therefore, it is necessary for the federal government to possess controls regarding the flow of confidential military information. The Court has recognized the government's compelling interest in national security, even when plaintiffs demonstrate very strong interests in the government's information. *See United States v. Reynolds*, 345 U.S. 1, 10-11 (1953) (holding that widows were not entitled to Air Force testing documents in a wrongful death suit because disclosure would violate the national security interest retained by the government).

As applied to the case at bar, Air Base Avellino is an Air Force testing site that conducts tests on new military technologies out of the public eye. (D. Avellino at *14.) The government's competitive interest in protecting its technological developments is stronger than the interest of private business in safeguarding new technological developments. *See generally O'Reilly*, 56 U.S. 62 (1854). If adversaries were able to discern details of new technologies from photographs,

they could replicate the technology or at the very least learn how to subvert its use in conflict. If Respondent were to sue for access to photographs akin to the ones he took, he would not be successful. *See Reynolds*, 345 U.S. at 10-11. Respondent's *desire* to tell the story of Air Base Avellino does not overcome the government's *need* for discretion, and certainly doesn't rise to the level of the unsuccessful claim in *Reynolds*. *See id.*; (D. Avellino at *14.) As such, the government's compelling interest is strong and difficult to overcome. Respondent's case fails to outweigh the governmental interest.

B. § 795 is narrowly tailored to protect the compelling national security interests of the government.

As a part of his defense, Respondent raised the issue of unconstitutionality of § 795, as is his right in a case of this nature. (D. Avellino at *28.); s*ee, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972). In *Gooding*, the Court found that Georgia's statutory prohibition against the use of language that "breech[es] the peace" did not pass constitutional muster because it was overinclusive in application to speech that was not the target of the regulation. *See Gooding*, 405 U.S. at 528. In order to pass strict scrutiny, a statute must be narrowly tailored to the compelling governmental interest, as applied to both the public and the particular litigant, and not be under- or over-inclusive. *See Williams-Yulee v. Fla. Bar*, 573 U.S. 433, 444 (2015); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989). The distinct tailoring requirements look at both the construction and application of the statutory scheme when determining whether the level of inclusivity is appropriate. *See Williams-Yulee,* 573 U.S. at 444. Here, § 795 is narrowly tailored in its construction to the general public and in its application to Respondent's actions. In both contexts, the statute acts exactly as it was designed in order to protect the national security interests, while also providing procedural alternatives to regulated entities.

1. § 795 is narrowly tailored in its construction as applied to the public.

As stated, a statute cannot survive strict scrutiny if it is underinclusive or overly vague. *See Public Citizen*, 491 U.S. at 444. In *Williams-Yulee*, the Court held that the Florida Bar's restriction on campaign activity for judicial positions survived strict scrutiny. 573 U.S. at 444. Based on the interest in maintaining an impartial, professional, and respected judiciary, the Court held that the Florida Bar's policy, while restrictive, was not an improper regulation on behalf of the state. *Id.* Though there was stringent and targeted application towards judicial candidates, the state's compelling interest in preserving judicial ideals by imposing a higher standard for the judiciary justified the regulation. *Id.*

Here, the statute is still narrowly tailored, but far less restrictive as to the public. *See id.* While photographs, sketches, pictures, drawings, maps, and geographical representations are subject to the regulation, this is not underinclusive as to the protection of the compelling governmental interest because it does not limit the regulation to professional photographers, sketchers, artists, and cartographers. *See id.* Rather, the regulation merely prevents the spread of potentially harmful information without targeting a specific group. *See id.* The law applies to all individuals who would potentially engage in this type of behavior and is sufficiently broadly drafted in order to achieve the compelling governmental interest. *See id.*

Similarly, § 795 is not overinclusive to the types of speech being regulated or the individuals impacted. *Fla. Bar v. Went for It*, 515 U.S. 618, 632 (1995). To survive strict scrutiny, a regulation on speech must be the least restrictive means possible that is not overinclusive as to who is being regulated. *Id.* In *Went for It*, the Court analyzed a different challenge to restrictions on speech set forth by the Florida Bar. *Id.* In this scenario, the Bar set forth content-based restrictions against solicitations by attorneys with the purported interest of

professionalism. *Id.* Specifically, the Bar was trying to prevent the mailing of flyers and advertisements to accident victims, encouraging them to hire a particular attorney. *Id.* The Court applied intermediate scrutiny to this case because it was commercial speech. *See id.* at 623. The Bar's important interest is markedly similar to the compelling interest set forth in *Williams-Yulee*, since the Bar was aiming to enhance legal professionalism. 573 U.S. at 444. The Court provided it the same treatment and weight accordingly. *See Went for It*, 515 U.S. at 623.

Here, § 795 is not restrictive beyond what is absolutely necessary. *Id.* at 632. The governmental interest in preventing adversaries from having access to the blueprints, layouts, and visual appearance of military installations can only be prevented by limiting the activity described in § 795. It does not criminalize mere observation or ban individuals from personally perceiving what is on public property. § 795. It simply regulates the activities that are inherently mediums through which sensitive information can be passed. *See id.* There is not a less restrictive scheme that would accomplish the national security goal to the necessary level. Moreover, this is not a broad criminalization of innocent behavior. The statute places a clear burden on the photographer to obtain permission before taking photographs of military installations and provides a process for doing so. *Id.* If the photographer's interests are determined to not be violative of the national security interests at stake, they can be approved; if they are determined to be violative of the national security interests, they will be denied. It is critical to maintain this discretion within the highest levels of the military because these officers are most likely to understand what would pose a risk to the national security interest. *See Snepp*, 444 U.S. at 515-16.

Respondent will try to argue that this is merely the photography of public officials in public buildings operating in a public capacity. *See Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir.

2011). However, this case is a vastly different situation from the one at hand and therefore not applicable. *Id.* at 79-80. In *Glik*, three police officers were arresting an individual, when Mr. Glik overheard someone shouting, "You're hurting him, stop." *Id.* at 79. Mr. Glik proceeded to record the officers making the arrest. *Id.* at 80. Once the initial arrest was made, Mr. Glik was subsequently arrested for violating Massachusetts' wiretap statute. *Id.* at 80.

The direct impact on the citizenry and the public safety mission of the police creates meaningful differences from the national security interest of the military. *Id.* at 79-80. Because the police operate in the public space and aim to protect public order, discretion and secrecy are not as imperative as they are in the military context. *Id.* at 79-80. In fact, current trends have encouraged police departments to be more transparent about their internal policies, hiring criteria, bias training, etc. *See, e.g.,* Policing Transparency Act, H.R. 8597, 116th Cong. (2020). Moreover, access to military installations often requires a high-level security clearance as determined by the U.S. government. While police officers must at times keep information confidential, they are not subject to the same stringent investigation that national security necessarily requires. *See Snepp*, 444 U.S. at 515-16. As such, the government maintains a significantly stronger interest in regulation for the case at bar than existed in *Glik.* 655 F.3d at 85. The argument remains centered around public facing, non-federal officers in *Am. C.L. Union of Illinois v. Alvarez*, *Smith v. City of Cumming*, and *Robinson v. Fetterman*. 679 F.3d 583 (7th Cir. 2012) (holding that the individual's First Amendment interests in recording the police outweighed the state's interest in maintaining privacy of operations); 212 F.3d 1332 (11th Cir. 2000) (affirming a First Amendment right to record public police conduct); 378 F. Supp. 2d 534 (E.D. Pa. 2005) (holding that the First Amendment right to record the police is particularly prudent in the context of a Fourth Amendment search). The notion that this line of cases creates a

broad right to photograph all public employees at all levels of government is not plausible and fails to consider the federal government's unique national security interests. *See Snepp*, 444 U.S. at 515-16.

2. § 795 is narrowly tailored in its application to Respondent.

§ 795 creates an unambiguous standard for photographer compliance and does not yield absurd results in application. Under *Texas Brine Co. v. Am. Arb. Ass'n*, the Court's statutory analysis should focus on whether the plain language is ambiguous and whether the application of the plain language yields absurd results. 955 F.3d 482 (5th Cir. 2020). If photographers wish to take photographs of specially designated military installations, they must receive approval from particular military officers. This is unambiguous in terms of both construction and application of the statute. *See id.* Respondent did not obtain such approval and proceeded to take the photographs anyway. (D. Avellino at *15.) As such, he was criminally punished—a consequence made clear in the statute. (*Id.* at *18.) This does not yield an absurd result related to the intentions of the plain language. Rather, this is exactly the type of behavior that the statute aims to prevent: complete disregard for the law and complete subversion of legitimate procedural processes designed to protect the national security. *See Texas Brine Co.*, 955 F.3d at 482.

Respondent's refusal to comply with the reasonable procedures put in place by the regulation poses a greater issue than the content of his photographs. Under the *Grutter v. Bollinger* regime, a state actor may not use a constitutionally restrictive factor as the sole determinant in imposing the action. 539 U.S. 306 (2003) (holding that the University of Michigan Law School's consideration of race as a factor towards achieving a diverse law school class was sufficiently narrowly tailored to the achievement of a compelling state interest). The appellate court erred in asserting that the determinative factor in the arrest of Respondent was the

content of the photograph. (12th Cir. at *55.) The determinative factors leading to his arrest were his behavior and failure to comply with the clear requirements of § 795, akin to the holistic determination made in *Grutter*. *See generally* 539 U.S. 306. It should be emphasized that had Respondent been successful in sharing the unlawfully captured images, he would have put not only the military at risk, but also himself and the rest of the public. The government's response, authorized by § 795, is at the very least proportional to the threat Respondent's actions created, and certainly appropriate in deterring this conduct broadly. Had Respondent exercised the procedure afforded to him by § 795, there is no clear answer as to whether his request would have been approved. However, the Court cannot assume one way or the other because Respondent never gave the process the chance to work.

Further, the assertion that Respondent was simply making an innocent plain view observation is neither logically nor factually supported. Respondent intentionally used a camera with 60x zoom to observe the exact contents that § 795 aims to protect. (D. Avellino at *15.) The application of the statute to his behavior does not punish innocent actions, but rather targeted disobedience of the law and ignorance of process. *C.f. Ciraolo*, 476 U.S. at 213 (holding that plain view observations were constitutional in the context of obtaining a search warrant). *Ciraolo* is distinguishable from this case, however, because the flyover in that case was within the letter of the law, whereas the action of taking the photographs was not. *Id.*; (D. Avellino at *18.) Additionally, the flyover in *Ciraolo* was conducted using a naked eye observation, whereas Respondent utilized a camera with 60x zoom to further inspect the details of the confidential military installation. 476 U.S. at 213; (D. Avellino at *15.) Moreover, the flyover did not create a medium by which the information could be shared outside of word of mouth, whereas photographs could potentially provide adversaries with visual evidence of military installations.

See Ciraolo, 476 U.S. at 213; (D. Avellino at *15.) Thus, Respondent's actions are distinguishable from the government's, and should not be entitled to the same protections based on the potential threat they pose to national security.

C. Under the statutory scheme of § 795, neither Respondent nor the public are precluded from sharing their experiences and observations in a manner that would not compromise national security.

Respondent and the public possess the right to make plain view observations of military installations from publicly accessible property. This right is not infringed upon by § 795's regulation. Statutes such as § 795 are subject to common law requirements to allow alternatives of communication, while also ensuring that the statute is not underinclusive. *See Regan*, 468 U.S. at 648; *Williams-Yulee*, 573 U.S. at 444. This dichotomy creates a difficult framework through which Congress must legislate. However, Congress has done so successfully here. The Circuit Court points to rangefinders and written word as proof that the statute is underinclusive, under *Williams-Yulee*. 573 U.S. at 444; (12th Cir. at *56-57.) However, this furthers the point that alternatives exist outside of the enumerated prohibitions of § 795. Yet, the important prohibition of § 795 is the restriction of the visual medium of sharing the information. Functionally, written word and rangefinders are much more akin to word-of-mouth communication than they are to sharing the potentially dangerous visual medium. Moreover, written word communication would be subject to similar protections as the Court found in *Snepp*. 444 U.S. at 515-16. This would quell the Constitutional concern of under-inclusivity without completely eliminating alternatives to Respondent's speech. *See Williams-Yulee*, 573 U.S. at 444.

Further, as previously noted, plain view observations and pure speech regarding those observations are not infringed upon by § 795. Respondent and others enjoy the full right to engage in this behavior under the statute. However, Respondent took it a step further, memorializing the images in visual medium, while failing to follow the statutory procedure. The

statute is inclusive to the point of ensuring compliance with the law, but not overly inclusive as to criminalize innocent behavior. *Id.* It is similarly not underinclusive, as it adequately protects the compelling interest of the government. *Id.*

Because § 795 is sufficiently narrowly tailored to the achievement of a necessary and compelling governmental interest, the statute passes constitutional muster in its application to Respondent's behavior.

Applicant Details

First Name	**Marina**
Last Name	**Berardino**
Citizenship Status	**U. S. Citizen**
Email Address	**berar018@umn.edu**
Address	**Address** Street **9141 Olson Memorial Highway Apt. 304** City **Golden Valley** State/Territory **Minnesota** Zip **55427** Country **United States**
Contact Phone Number	**954-673-9740**

Applicant Education

BA/BS From	**Boston University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Minnesota Law School** **http://www.law.umn.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Minnesota Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Reitz, Kevin
reitz027@umn.edu
(612) 626-3078
Van Nest, Jeffrey
vann0130@umn.edu
612-900-4722
Chang, Amy
amy.chang@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Marina Berardino
9141 Olson Memorial Highway Apt 304, Golden Valley, MN 55427
954.673.9740 • berar018@umn.edu

June 12, 2023

The Honorable Judge Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA

Dear Judge Walker,

As a third-year student at the University of Minnesota Law School, I am writing to apply for a 2024 clerkship in your chambers. I became interested in clerking for a judge after observing criminal proceedings and meeting with federal judges in the District of Arizona during my externship with the United States Attorney's Office after my first year of law school. My strong legal research, writing and critical thinking skills will make me an effective clerk in your chambers.

I excelled throughout my first-year legal research and writing course and received class honors. As an extern with the criminal division in the USAO for the District of Arizona, I further developed these skills. Working with AUSAs I researched legal issues in active cases concerning violent crimes, financial crimes, national security threats, and crimes committed on the Southwest border. I wrote responses to motions, objections to pre-sentencing investigation reports, sentencing memoranda, and an appellate motion for summary affirmance. I further developed my legal research and writing skills during my judicial externship with Judge John Tunheim in the United States District Court for the District of Minnesota. Collaborating with the law clerks, I conducted legal research to prepare bench memoranda and draft orders. I continued to hone my legal research and writing skills through my clinical work with the Federal Defenders Office for the District of Minnesota where I completed motions concerning Fourth and Fifth Amendment violations and position pleadings for sentencing. This summer I hope to strengthen these skills through litigation assignments as a summer associate at Sullivan & Cromwell LLP.

As an executive board member of the competitive Mock Mediation team at Boston University, I learned the importance of zealous advocacy while appreciating the benefits of collaboration with opponents to achieve the best outcome. In both mediator and attorney roles, I competed in mediation simulations of complex legal issues. My critical thinking skills improved, as did my ability to collaborate in a fast-paced environment by developing and defending my arguments before a panel of judges in two-hour sessions.

I believe that my legal research and writing skills, along with my mock mediation experience, qualify me to be a useful clerk in your chambers. I have enclosed my resume, writing sample and law school transcript. Additionally, Amy Chang, Jeff Van Nest and Professor Kevin Reitz have prepared letters of recommendation to accompany my application. Thank you for your consideration.

Sincerely,

Marina Berardino

Marina Berardino

9141 Olson Memorial Highway Apt 304, Golden Valley, MN 55427
954.673.9740 • berar018@umn.edu

EDUCATION

University of Minnesota Law School, Minneapolis, MN
J.D. Anticipated, May 2024
Minnesota Law Review, Staff Member (Vol. 107), Managing Editor (Vol. 108)
GPA: 3.917, Rank: 17 / 227 (calculated annually, current as of April 2023)
Awards: Dean's List – 2 Academic Years, Book Award – Advanced Administrative Law, Legal Research and Writing Section Honors
Activities: Minnesota Justice Foundation Street Law Volunteer, Asylum Law Project Volunteer

Boston University, Boston, MA
B.A., Political Science, *cum laude*, May 2021
GPA: 3.740
Honors: Panhellenic Honors Society
Activities: Alpha Phi Eta Chapter, Vice President of Membership Recruitment
Mock Mediation, Director of Public Relations: Social Media
InterNational Academy of Dispute Resolution (INADR) National Competitions:
2020 placed 2nd in Advocate/Client Category, 9th in Mediator Category;
2019 placed 3rd in Advocate/Client Category; 2018 placed 4th in Team Category

EXPERIENCE

Sullivan & Cromwell LLP, New York, NY
Summer Associate, May 2023 – Present
Research legal issues regarding SEC and FCA regulatory enforcement actions and federal securities laws. Produce memoranda for litigation associates and partners. Attend client meetings and assist in preparation for testimony.

Federal Public Defender, District of Minnesota, Minneapolis, MN
Law Clerk, January 2023 – May 2023
Met with clients in preparation for writing motions and attending hearings. Shadowed attorneys and attended motion hearings, trials, and sentencings. Conducted legal research for and wrote motions filed in the District Court of Minnesota.

University of Minnesota Law School, Minneapolis, MN
Legal Research and Writing Student Instructor, September 2022 – May 2023
Coordinated weekly lesson plans with lead professor. Distributed materials to students. Provided nine students with detailed feedback on eight legal writing assignments. Met with students to further their research and writing development.

Honorable John Tunheim, U.S. District Court, District of Minnesota, Minneapolis, MN
Judicial Extern, September 2022 – December 2022
Wrote and edited bench memoranda and orders for Judge Tunheim. Researched various areas of federal law. Assisted law clerks with preparation for hearings.

United States Attorney's Office, District of Arizona- Criminal Division, Phoenix, AZ
Law Student Volunteer, May 2022 – July 2022
Researched legal issues in active cases, wrote briefs and motions filed in the District Court and Ninth Circuit Court of Appeals. Assisted with trial preparation and evidence review.

Boston University Political Science Department, Boston, MA (Remote)
Research Assistant, June 2020 – August 2020
Collected and analyzed data on housing policies enacted by states and cities in response to Covid-19. Coauthored with fellow researchers to produce 36-page policy report.

University of Minnesota Unofficial Transcript

Name : Berardino,Marina Rose
Student ID : 5461624
Birthdate : 7 - 17

Print Date: 05/30/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities
Program : Law School
Plan : Law J D
Degree Sought : Juris Doctor

* * * * * **Beginning of Law Record** * * * * *

Fall Semester 2021
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6001	Contracts	4.00	4.00	A	16.000
LAW	6002	Legal Research & Writing	2.00	2.00	H	0.000
LAW	6005	Torts	4.00	4.00	A+	17.332
LAW	6006	Civil Procedure	4.00	4.00	A	16.000
LAW	6007	Constitutional Law	3.00	3.00	A-	11.001
TERM GPA :	4.022	TERM TOTALS :	17.00	17.00	15.00	60.333

Spring Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6002	Legal Research & Writing	2.00	2.00	H	0.000
LAW	6004	Property	4.00	4.00	A	16.000
LAW	6009	Criminal Law	3.00	3.00	A-	11.001
LAW	6013	Law in Practice: 1L	3.00	3.00	P	0.000
LAW	6018	Legislation and Regulation: 1L	3.00	3.00	A-	11.001
TERM GPA :	3.800	TERM TOTALS :	15.00	15.00	10.00	38.002

Fall Semester 2022
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6085	Criminal Procedure: Investigtn	3.00	3.00	A	12.000
LAW	6219	Evidence	3.00	3.00	B+	9.999
LAW	6614	Hist of the Amer Legal Profssn	2.00	2.00	A	8.000
LAW	7003	Legal Research & Writing Instr	2.00	2.00	H	0.000
LAW	7102	Law Review: Research & Writing	1.00	1.00	H	0.000
LAW	7628	Judicial Field Placement	3.00	3.00	P	0.000
TERM GPA :	3.750	TERM TOTALS :	14.00	14.00	8.00	29.999

Spring Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6629	Indian Law	2.00	2.00	A	8.000
LAW	6650	Advanced Administrative Law	3.00	3.00	A+	12.999
LAW	6661	PR - General	3.00	3.00	A-	11.001
LAW	7003	Legal Research & Writing Instr	2.00	2.00	H	0.000
LAW	7102	Law Review: Research & Writing	1.00	1.00	H	0.000
LAW	7572	CL: Federal Defense	3.00	3.00	A	12.000
TERM GPA :	4.000	TERM TOTALS :	14.00	14.00	11.00	44.000

Fall Semester 2023
University of Minnesota, Twin Cities
Law School
Law J D

Course		Description	Attempted	Earned	Grade	Points
LAW	6036	Reproductive Rights & Justice	3.00	0.00		0.000
LAW	6039	US Supreme Court & Great Cases	3.00	0.00		0.000
LAW	6051	Business Associations/Corps	4.00	0.00		0.000
LAW	6126	Water Law	2.00	0.00		0.000
LAW	6604	Family Law	3.00	0.00		0.000
LAW	7100	Law Review Editors	2.00	0.00		0.000
TERM GPA :	0.000	TERM TOTALS :	17.00	0.00	0.00	0.000

Law Career Totals

CUM GPA:	3.917	UM TOTALS:	77.00	60.00	44.00	172.334
		UM + TRANSFER TOTALS:		60.00		

***** End of Transcript *****

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in strong support of Marina Berardino's clerkship application. On academic record alone, she will be competitive on the national clerkship market—and she adds considerable personal strengths to her intellectual firepower.

I first became acquainted with Marina as a student in my 1L Criminal Law course in Spring 2022. She is now enrolled in my upper level Criminal Procedure (Investigation) course. In addition, for the 2022-23 academic year, I am serving as faculty adviser for Marina's law review Note (for the flagship Minnesota Law Review). At Minnesota, this includes close contact with the student author at all stages of the research and writing process including topic selection, outline, first and second drafts, and an oral workshop presentation.

Marina has been one of most perceptive and engaged students in both of the courses she has taken with me. She has attended office hours regularly. I have been impressed with Marina's organized and energetic approach to her law school education and longer-term career plans. She is forward-looking and entrepreneurial while at the same time being personable, open-minded, and considerate. She is a serious, talented, professional, with a strong moral center and lack of pretense. She is impossible not to like.

Marina's abilities are evident from her law school transcript (she is currently 12th in her class with no grade lower than an A-) and in her successes on the job market (having won a 2022 summer volunteer position in the U.S. Attorney's Office for the Southern District of Arizona, a judicial externship in the U.S. District Court in Minneapolis, and a 2023 summer clerkship with Sullivan & Cromwell in New York City). Ultimately, her goals are to seek a federal clerkship, apply to the U.S. Department of Justice Honors Program, and pursue a career as a federal prosecutor.

Marina's plans have grown from knowledge gathering and mature reflection. As an undergraduate she was inspired by coursework in the criminal justice field, which initially set her on a path to become a criminal defense attorney. During her time in law school and the U.S. Attorney's Office in Arizona, however, she has developed the view that American legal systems are just as much in need of responsible prosecutors as strong defense advocates. One of Marina's friends and fellow students worked at a federal prosecutor's office before law school and recounted her experiences to Marina. For the first time, in her law school courses, Marina was exposed to the idea that prosecutors have a higher responsibility to do justice than to rack up the most convictions and the heaviest sentences. Last summer at the U.S. Attorney's Office in Arizona, Marina attended office-wide conferences in which current cases were discussed (and the opinions of law clerks were solicited). She was impressed with the balanced nature of the conversations and the restraint she saw among prosecutors in selecting cases and charges to be filed. She observed that there was a tendency to under-charge and to struggle conscientiously with the contours of a fair plea offer. She felt she was seeing the "do justice" ethic in actual practice. While she has told me she does not know if all prosecutors' offices have a similarly balanced culture, she became convinced that it was crucial for people with such sensibilities to become prosecutors.

Marina's history demonstrates a personal compassion that, for her, is a strong gravitational force. During her summer in Arizona, she became concerned with problems of domestic violence on Native American reservations and the shifting jurisdictional tangles that make those problems difficult to address. She was especially affected by her meetings with domestic violence victims and the hopelessness some of them voiced about their chances of getting help from the legal system. As a result of Marina's empathy for victims and her recognition of the complex jurisdictional and resource issues that frustrate effective response, she chose this as the subject of her law review Note. This helped me understand her character and her ambitions. She explained that she cares most about the people in the system—but is also attracted to the challenge of complex problems with no obvious solutions.

Marina recounted an anecdote that was revealing about her motivations to become a lawyer. In her current judicial externship, the clerks meet periodically to divide up assignments from the judge. Marina noted that she always volunteers to wade through pro se petitions, not always a popular task among the clerks. For Marina, however, it is deeply satisfying. She told me, "I feel sorry for the people. They have no lawyers to help them and some of them have legitimate claims." Marina's values and acute awareness of human consequences are exceptional—and much to be welcomed in the legal profession.

I am confident that Marina will shine in any interview she is offered. I hope that you will give her that opportunity. Please do not hesitate to be in touch if you would like more information. My cell number is 651-890-6897.

Best regards,

Kevin Reitz

Kevin Reitz - reitz027@umn.edu - (612) 626-3078

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter to offer my strongest possible support for Marina Berardino's application for a clerkship in your chambers.

I have been in practice for over 28 years in variety of legal settings from criminal defense trial lawyer, appellate attorney, federal agency counsel, and Fortune 50 corporate counsel. I also served as a Staff Attorney for the U.S. Court of Appeals for the D.C. Circuit. In each of these settings, I am keenly aware how legal writing skills impact our profession.

Marina was a student in my 1L Legal Writing and Research class at the University of Minnesota Law School. As a student, Marina consistently performed in the top of her cohort. Marina demonstrated commitment to the legal profession and made conscious efforts to improve her legal research and writing by meeting with me and our student instructor. As part of the course, Marina submitted five written assignments throughout the fall and spring semester. Based on the thoroughness of her research and the clarity of her writing, I was impressed by her work ethic and attention to detail—essential skills for any aspiring lawyer. In particular, I used Marina's open memo and brief as examples in class to show her classmates how to more effectively present legal arguments. For her hard work, Marina received high honors in the course and received a prestigious offer to return the following year to help me teach the course. I thoroughly enjoyed having Marina as a student and am confident she will succeed in whatever role she pursues after graduation. Based on her excellent legal writing skills, commitment to service, and great attitude, I strongly recommend Marina to serve as a clerk in your chambers.

Marina's success in my legal writing class led her to distinguish herself throughout her summer externernship with the United States Attorney's Office, District of Arizona. I was able to connect with Marina while she was in Arizona and heard about the work she did. Marina not only observed how the U.S. Attorney's Office approached legal questions, but she also performed substantive research and writing assignments throughout the office on a variety of matters. It was clear from our conversations that Marina has a passion for public service and intellectual curiosity. On a personal level, Marina is a very likeable, good-natured, and respectful who has no problem interacting with her fellow law students, professors, supervisors, or myself.

In conclusion, I offer my strongest possible recommendation for Marina Berardino as a clerk in your chambers. Amongst her high-achieving classmates at the University of Minnesota Law School, Marina ranks in the top 5% and has proven herself to be equipped with the writing and interpersonal skills to do well as a clerk.

If you hire Marina, I anticipate she will excel and contribute positively to your chambers. I hope you give her application serious and favorable consideration. Should you require any additional information, please do not hesitate to contact me at (612) 900-4722.

Sincerely,
Jeffrey K. Van Nest

U.S. Department of Justice

Two Renaissance Square
40 N. Central Ave., Suite 1800
Phoenix, AZ 85004-4408

Main: (602) 514-7500
Main Fax: (602) 514-7693

June 10, 2023

Re: Marina Berardino's Judicial Clerkship Application

Dear Chambers:

I am happy to write a letter of recommendation on behalf of Marina Berardino, who is applying for a judicial clerkship in your chambers.

I had the opportunity to work with Marina during the summer after her 1L year, when she served as an extern for the United States Attorney's Office for the District of Arizona. In that role, Marina worked with criminal Assistant U.S. Attorneys at various stages of prosecution, including responding to motions to suppress, preparing jury instructions, revising search warrant affidavits, researching legal issues, drafting sentencing memoranda, and assisting with appellate briefs.

During her time in the office, Marina helped me with legal research regarding law enforcement's use of emergency disclosures to obtain information from electronic service providers. Her analysis was helpful in understanding the circumstances under which law enforcement can obtain and use these emergency disclosures in investigations. She also helped a colleague draft a motion for summary affirmance in response to a pro se defendant's Ninth Circuit appeal. Her draft was clear, organized, and well-written.

Marina was a wonderful and valued member of our summer class. Her work ethic, responsiveness, and open communication style demonstrated an eagerness to learn and to understand our cases. She met regularly with attorneys in the office to discuss cases, kept me and other AUSAs up to date on her progress, and sought out opportunities to develop her legal research and writing skills. She is a pleasure to work with and to be around and would be a terrific addition to your chambers. If you have any questions or would like to discuss further, please do not hesitate to contact me at Amy.Chang@usdoj.gov or (602) 514-7574.

Sincerely,

Amy C. Chang
Assistant United States Attorney

Marina Berardino
9141 Olson Memorial Highway Apt 304, Golden Valley, MN 55427
954.673.9740 • berar018@umn.edu

Writing Sample

This writing sample contains objections to a presentence investigation report and a sentencing memo that I wrote during my summer 2022 externship with the United States Attorney's Office in the District of Arizona. It has only been edited by myself. I have received permission from the Assistant United States Attorney responsible for the case to use this piece as a writing sample. I edited the piece to preserve the anonymity of the defendant and victims.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. XXX, Defendant.	**UNITED STATES' OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT and SENTENCING MEMORANDUM**

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is before the Court facing sentencing for Theft under 18 U.S.C. §§ 1153 and 661. On September 7, 2019, Defendant forcibly removed Victim 1 from his vehicle, repeatedly struck him in the face, grabbed him by the neck, and forced him to the ground. (Doc. 26 at 5). After taking the keys from Victim 1 and driving several miles away, Defendant attempted to remove Victim 2 from the vehicle but failed. *Id*. Victim 2 exited the vehicle on his own and Phoenix Police Department found Defendant with the stolen vehicle the next day. (Doc. 26 at 4). Then on September 9, Defendant was found at the scene of a single vehicle rollover accident involving a truck that he had stolen. (Doc. 26 at 7). Defendant has pleaded guilty to Count 2 of the indictment charging him with Theft. (Doc. 21 at 1).

II. OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

The United States, through undersigned counsel, respectfully objects to three aspects of the draft Presentence Investigation Report. (Doc. 26). First, the Court should

assess an enhancement under U.S.S.G. § 2B1.1(b)(16)(A) because the offense involved conscious or reckless risk of serious bodily injury. Accordingly, the offense level should be 14. After a two-level reduction for acceptance of responsibility, the total offense level should be 12. Based on Defendant's placement in Criminal History Category I, the Guideline range should be 10–16 months.

If the Court determines that § 2B1.1(b)(16)(A) does not apply, however, it should still assess a two-level enhancement under U.S.S.G. § 2B1.1(b)(3) because Defendant took the vehicle from both victims.

Finally, the Court should adjust the Guideline calculation for robbery contained in paragraph 69 of the PSR. The Total Offense Level should be 21 (rather than 19), resulting in a Guideline range of 37–46 months.

a. The § 2B1.1 offense level should be 14 because Defendant created a risk of serious bodily injury by punching Victim 1 in the face and leaving him in the streets alone.

Defendant pleaded guilty to Theft in violation of 18 U.S.C. §§ 1153 and 661. U.S.S.G. § 2B1.1 applies to this offense and the PSR writer assesses a baseline offense level of six with no enhancements. However, Section 2B1.1(b)(16)(A) states that "[i]f the offense involved … the conscious or reckless risk of death or serious bodily injury … increase by two levels. If the resulting offense level is less than level 14, increase to level 14." U.S.S.G. § 2B1.1(b)(16)(A). Serious bodily injury is any "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1 cmt. n.1(L). As the enhancement considers the

nature and extent of the offense to which Defendant pleaded guilty, the government must prove a § 2B1.1(b)(16)(A) enhancement by a preponderance of the evidence. *United States v. Johansson*, 249 F.3d 848, 852 (9th Cir. 2001).

The enhancement does not require significant bodily injury to have actually occurred because "it is the creation of risk, not the infliction of injury, that is required for application of [§2B1.1(b)(16)(A)]." *United States v. W. Coast Aluminum Heat Training Co.*, 265 F.3d 986, 993 (9th Cir. 2001). There need only be "some evidence" that the conduct created a risk of serious bodily injury. *United States v. Thorsted*, 439 F. Appx 580, 582 (9th Cir. 2011). In *United States v. Kantete*, the Court affirmed application of this enhancement to two vehicle thefts: the first was a carjacking and the second involved a police chase where another vehicle was hit. 610 F. Appx 173, 176 (3d Cir. 2015).

Other courts have applied the enhancement to conduct that is less directly linked to a risk of serious bodily harm than the conduct in this case. In *Thorsted*, the court held that a defendant making false distress calls to the United States Coast Guard created a risk of serious bodily injury by interfering with the "Coast Guard's ability to respond to actual distress calls" and because rescue missions are inherently risky. 439 F. Appx 580, 582 (9th Cir. 2011). *See also*, *Johansson*, 249 F.3d at 852 (9th Cir. 2001) (finding that the owner of a trucking business that authorized violations of federal regulations limiting the number of hours operators of motor carriers may drive created a substantial risk of bodily harm to other drivers on the road).

Another court, applying a similar guideline provision, concluded that a single punch by an unarmed person creates a substantial risk of significant bodily injury, a higher

standard than necessary here. *United States v. Alexander*, 712 F.3d 977, 979 (7th Cir. 2013). The *Alexander* Court further held that a risk of serious bodily harm can exist where a victim only suffers minor injuries not requiring medical attention. *Id*. at 978. *See also*, *United States v. Ashley*, 141 F.3d 63, 67 (2d Cir. 1998) (affirming district court's assessment that "there still is a substantial risk of serious bodily injury to someone who is on the receiving end of a punch or an elbow"); *United States v. Webster*, 500 F.3d 606, 607-08 (7th Cir. 2007) (finding that defendant's five punches and five kicks to victim's head caused serious bodily injury); *United States v. Reyes-Vencomo* No. CR 11-2563 JB, 2012 WL 2574810, at *8 (D.N.M. June 26, 2012) (reasoning that the defendant could have caused serious bodily injury to the victim by striking him in the face).

In the present case, defendant created a risk of serious bodily injury when he punched Victim 1 in the face, causing a swollen nose and bruising around the eyes, and when he attempted to pull Victim 2 out of the vehicle. (Doc. 26 at 5). Defendant's conduct posed a more direct risk of serious bodily harm than the conduct of the defendants in *Thorsted* and *Johansson*. Defendant admitted that he "forcibly stole a vehicle by physically assaulting the driver." (Doc. 26 at 16). He recalled striking Victim 1 in the face seven to eight times and grabbing him by the neck. (Doc. 26 at 5). He punched Victim 1 in the face "for approximately two minutes and left him lying on the ground of the parking lot." (Doc. 26 at 4). Defendant's assault of Victim 1 alone – which involved repeated blows to Victim 1's head – created a risk of serious bodily injury. This risk heightened when Defendant left Victim 1 in the parking lot.

This conduct evidences a less speculative risk of serious bodily harm than the actions of the defendants in *Thorsted* or *Johansson*. In *Thorsted*, the risk enhancement applied because Coast Guard personnel responding to the defendant's false distress calls flew at low altitudes at night. 439 F. Appx at 582. In the present case, Defendant posed a more immediate threat to the safety of others when he struck Victim 1 multiple times. *See Alexander*, 712 F.3d at 979. Defendant's conduct was also more dangerous than the conduct of the defendant in *Johansson*. The punches to Victim 1 and the attempted forcible removal of Victim 2 from the car involve identifiable victims, whereas the defendant in *Johansson* created a more general risk of harm to drivers on the road. The §2B1.1(b)(16)(A) enhancement is warranted considering Defendant's directly violent conduct and the injuries sustained by Victim 1.

If the court applies the enhancement from U.S.S.G. § 2B1.1(b)(16)(A), the total offense level would be 12 (rather than four) in Paragraph 23 of the PSR.

b. Even if U.S.S.G. § 2B1.1(b)(16) does not apply, Defendant should receive a two-level enhancement under U.S.S.G. § 2B1.1(b)(3) because the offense involved a theft from another person.

Should the court find U.S.S.G. § 2B1.1(b)(16) does not apply, it should increase the baseline offense level of six by two levels under U.S.S.G. § 2B1.1(b)(3) because the offense "involved a theft from a person of another." Defendant admitted in his plea agreement that he took the motor vehicle from Victims 1 and 2 (Doc. 21 at 7). After striking Victim 1 several times in the face, Defendant took the keys and drove off with Victim 2 still in the vehicle. (Doc. 26 at 5). Victim 2 exited the vehicle after Defendant attempted to forcibly remove him. *Id*. Defendant then drove off with the vehicle alone. *Id*.

The PSR writer did not apply the enhancement because the commentary to U.S.S.G. § 2B1.1 defines "theft from the person of another" as "theft, without the use of force, of property that was being held by another person or was within arms' reach." U.S.S.G. § 2B1.1 cmt. 1. The comment limits the enhancement to non-forcible conduct because the robbery guideline would generally apply to forcible threats. U.S.S.G. § 2B1.1 cmt. (background).

Although the comment concerns non-forcible actions, it is illogical to limit the application of the enhancement to the non-forcible examples in the commentary (pick-pocketing and non-forcible purse-snatching) when the defendant committed a more serious taking and the § 2B1.1 guideline rather than the robbery guideline applies. The Court should apply the enhancement as it would in a case not involving a forcible taking.

If the Court finds that the comment does not permit this enhancement, the Court should nonetheless depart upward to account for the forcible taking of the vehicle from Victims 1 and 2.

c. Had Defendant been convicted of robbery, the total offense level would be 21.

The Probation Officer concludes that had Defendant been convicted of robbery, the counts would have been grouped pursuant to U.S.S.G. § 3D1.2(d) and the controlling guideline would impose a Total Offense Level of 19 and a Guideline range of 30–37 months. The United States disagrees with this calculation.

The base offense level for robbery is 20 pursuant to U.S.S.G. § 2B3.1. There are two applicable specific offense enhancements that increase the § 2B3.1 calculation to

offense level 24. First, "[i]f any victim sustained bodily injury," the offense level increases by two. Bodily injury is "any significant injury; *e.g.*, any injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." U.S.S.G. § 1B1.1 cmt. n.1(B). In this case, Victim 1 sustained bodily injuries from Defendant as documented in his arrest records. While Victim 1 blacked out and was unable to recall what happened at the bank with Defendant, he did wake up in jail with a swollen nose and bruising around his eyes. (Doc. 26 at 5). This is an injury that is both painful and obvious. *See United States v. Goss* 241 Fed. Appx. 440, 442 (9th Cir. 2007) (agreeing with the District Court that the victim sustained bodily injury as evidenced by two black eyes, facial bruising, and broken ribs).

A second two-level enhancement under U.S.S.G. § 2B3.1(b)(5) would apply because the offense involved carjacking. Section § 2B3.1 defines carjacking as "the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation." U.S.S.G. § 2B3.1 cmt. n.1. Here, after Defendant struck Victim 1 in the face, grabbed him by the neck, and threw him to the ground, he took the keys out of Victim 1's pocket, entered the vehicle, and drove off. (Doc. 26 at 5). He also attempted to pull Victim 2 out of the vehicle while Victim 2 was passed out in the front seat. *Id*.

After a three-level reduction for acceptance of responsibility, the total offense level under the Guidelines for a plea to robbery would be 21 (rather than 19) in Paragraph 69 of the PSR, and the resulting hypothetical Guideline imprisonment range would be 37–46 months.

III. A 16-MONTH SENTENCE IS APPROPRIATE UNDER 18 U.S.C. § 3553(a).

The United States recommends the Court impose a sentence of 16 months imprisonment in consideration of the 18 U.S.C. § 3553(a) factors. If the Court overrules the United States' objection and adopts the range calculated in the PSR, the Court should vary or depart upward.[1] The PSR writer also suggests an upward departure may be appropriate to account for dismissed and uncharged conduct.[2]

The nature and circumstances of the offense are notably serious. Defendant caused physical injury to Victim 1 which is beyond what is contemplated in a sentence for a non-forcible theft under U.S.S.G. § 2B1.1. Defendant's history and characteristics show that this offense was not an isolated incident. Shortly after the incidents of the present offense, Defendant stole a truck in Peoria, Arizona and intentionally caused a single vehicle rollover accident. (Doc. 26 at 7). Defendant also has a pending charge for receiving or transferring a stolen motor vehicle in November 2019. (Doc. 26 at 8). Defendant's conduct in the

[1] The commentary to § 2B1.1 states that an upward departure is warranted when "[t]he offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm…." U.S.S.G. § 2B1.1 cmt. n.21(A)(ii). Thus, even if the Court does not apply the U.S.S.G. § 2B1.1(b)(3) 2-level enhancement for theft from a person of another or the § 2B1.1(b)(16)(A) enhancement to level 14 for creating a risk of serious bodily injury, the Court should depart upwards to level 12 to account for the non-monetary harm caused by Defendant.

[2] U.S.S.G. §5K2.21 advises a departure may be appropriate to reflect "the actual seriousness of the offense based on conduct … underlying a charge dismissed as part of a plea agreement" that did not factor into the Guideline range. If Defendant had been convicted of robbery as charged, his Guidelines range would have been 37–46 months imprisonment.

present offense was part of a series of offenses during which he stole multiple vehicles. Thus, a sentence of 16 months is appropriate to deter Defendant from further engaging in such conduct. All these factors suggest that the United States' recommended sentence will be sufficient to account for the dismissed conduct, nature and circumstances of the offense, history and characteristics of Defendant and the need for adequate deterrence.

IV. CONCLUSION

For the foregoing reasons, the United States recommends that Defendant be sentenced to 16 months' imprisonment.

Applicant Details

First Name	**Halina**
Middle Initial	**R**
Last Name	**Bereday**
Citizenship Status	**U. S. Citizen**
Email Address	**hbereday@umaryland.edu**
Address	**Address** Street **1448 Sumwalt Ct.** City **Baltimore** State/Territory **Maryland** Zip **21230** Country **United States**
Contact Phone Number	**8137651667**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Maryland Francis King Carey School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=52102&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Maryland Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Energy and Sustainability Moot Court Competition Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just The Beginning Foundation**

Recommenders

Frey-Balter, Kathryn
kfrey-balter@law.maryland.edu
410-375-8764
Percival, Robert
rpercival@umaryland.edu
(410) 706-8030
Steinzor, Rena
rsteinzor@law.umaryland.edu
_410_ 706-0564

This applicant has certified that all data entered in this profile and any application documents are true and correct.

HALINA BEREDAY
1448 Sumwalt Ct., Baltimore, MD, 21230 | (813) 765-1667 | hbereday@umaryland.edu

April 2, 2023

Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am excited to apply for the position of Judicial Clerk for the 2024-2025 term. I am a second-year law student at the University of Maryland Francis King Carey School of Law and a graduate of Georgetown University in Washington, DC. My passion for judicial work led me to apply to your chambers in the United States District Court for the Eastern District of Virginia. I have worked and lived in Virginia for many years and plan to build a life here upon graduation from law school.

My substantial research and writing skills will make me an exceptional Judicial Clerk. I spent the last academic year as a judicial intern for two different judges on the U.S. District Court for the District of Maryland. This spring semester, I am a judicial intern to Judge Richard Bennett and, in the fall semester, I interned for Judge Lydia Griggsby. In both positions, I honed my writing expertise by constructing opinions, orders, and bench memoranda. My time as a research assistant for Professor Robert Percival has also refined my research skills, and I have aided his work in administrative, constitutional, and environmental law. Last summer, I improved this reasearch and writing prowess as a summer associate at MoloLamken LLP, a firm that specializes in complex trial, appellate, and Supreme Court litigation. This summer, I will further develop these abilities as a summer associate at Norton Rose Fulbright in Washington, DC.

Additionally, I serve as the Executive Editor for *Maryland Law Review* and am a member of the National Energy and Sustainability Moot Court Competition Team. My note on *West Virginia v. EPA* will be published this spring in *Maryland Law Review*. I also was published twice in college in Georgetown's environmental policy journal, *Cura Terra*, and the *Columbia Undergraduate Law Review*. These activities sharpened my research, writing, and editing abilities. I look forward to bringing these skills to your chambers.

Finally, my tenacity, grit, time management skills, and adaptability – developed through my time as an NCAA Division One rower– will enable me to succeed as a Judicial Clerk.

Thank you so much for your time and consideration. I look forward to hearing for you.

Sincerely,

Halina R. Bereday

HALINA BEREDAY
1448 Sumwalt Ct., Baltimore, MD 21230 | (813) 765-1667 | hbereday@umaryland.edu

EDUCATION

University of Maryland Francis King Carey School of Law
Juris Doctor Candidate, August 2021 – May 2024
GPA: 3.9, Rank: 12/226 (5.3%)
Honors: Donna Blaustein & Natalie R. DeMaar Scholarship Recipient (three-year full-tuition merit scholarship); National Energy Moot Court Competition Team (Selected out of 41 teams to advance to round of 16); CALI Excellence for the Future Award (Torts); High Distinction in Lawyering Skills
Extracurriculars: Environmental Law Society, Business Law Society, Women's Bar Association

Georgetown University, Washington, DC
Bachelor of Arts in Psychology, with minors in Environmental Studies & Religion, Ethics, and World Affairs, August 2017 – May 2021
GPA: 3.78
Honors: CRCA National Scholar Athlete, Patriot League Academic Honor Roll, First Honors, Second Honors, Dean's List
Extracurriculars: NCAA Division I Varsity Rowing, Vice President of The Grassroot Project, Georgetown Student Athlete Mentor

EXPERIENCE

University of Maryland Francis King Carey School of Law, Public Health Law Clinic, Baltimore, MD
Student Attorney, January 2024 – April 2024

Federal Trade Commission, Bureau of Competition, Washington, DC
Legal Intern, Mergers III, August 2023 – November 2023

Norton Rose Fulbright, Washington, DC
Summer Associate, Project Finance, May 2023 – July 2023

***Maryland Law Review*,** Baltimore, MD
Executive Editor, Vol. 83, January 2023 – Present
- Selected out of dozens of applicants to serve as the Vol. 83 Executive Editor on the Maryland Law Review Executive Board
- Spearheaded formatting of articles, preparation of articles for editing, and proofing final versions of articles

Staff Editor, Vol. 82, August 2022 – January 2023
- Authored note on U.S. Supreme Court case *West Virginia v. EPA*; one of three authors selected for publication in Vol. 82, Issue 3.

U.S. District Court, District of Maryland, Baltimore, MD
Judicial Intern, The Honorable Lydia K. Griggsby (September – November 2022), The Honorable Richard D. Bennett (January 2023 – Present)
- Drafted judicial opinions, orders, and bench memos on criminal, constitutional, contract, administrative, and civil rights law
- Facilitated criminal pre-trial judicial conferences and proceedings

University of Maryland Francis King Carey School of Law, Professor Robert Percival, Baltimore, MD
Research Assistant, June 2022 – Present
- Executed legal research on constitutional, environmental, energy, and regulatory law

MoloLamken LLP, Washington, DC
Summer Associate, May 2022 – June 2022
- Generated legal research and 10+ memoranda on constitutional and regulatory law and appellate and supreme court litigation
- Constructed motion in opposition used for Eighth Amendment pro bono criminal law case

U.S. House of Representatives, Office of the Congresswoman Deborah Wasserman-Schultz, Washington, DC
Congressional Intern, January 2021 – May 2021
- Formulated policy memos on energy, environmental policy, and sustainability, which convinced the Honorable Wasserman-Schultz to cosponsor relevant legislation

CVS Health, Washington, DC
Management & Leadership Intern, June 2020 – August 2020
- Evaluated waste disposal protocols, implemented a recycling program, and executed courses on regulatory and environmental law

PUBLICATIONS

West Virginia v. EPA: Majorly Questioning Administrative Agency Action & Authority. *Maryland Law Review*, April 2023.

A Reexamination of *Wisconsin v Yoder:* An Untenable Holding in the Modern Era. *Columbia Undergraduate Law Review.* December 2020. Presented at the Penn Undergraduate Law Journal x Columbia Undergraduate Law Review Fall 2020 Symposium.

Climate Change, Environmental Degradation, and Refugees: Displaced People in a Modernized World and the Case of the People of Tuvalu in the South Pacific. *Cura Terra.* June 2021.

LANGUAGES, CERTIFICATIONS, AFFILIATIONS, & INTERESTS

Languages & Certifications: Spanish, Lexis+ Proficiency, Westlaw Foundations in Legal Research
Professional Affiliations: Energy Bar Association; American Bar Association: Environment, Energy, and Resources; Infrastructure & Regulated Industries; and Administrative Law, Maryland State Bar Association: Environmental & Energy Law, Groton School Alumni Association
Interests: Hiking, tennis, squash, sailing, baking, traveling, film photography, running, and interior design

Student Information

Name

Halina Bereday

Curriculum Information

Current Program : Juris Doctor

Program	Major Concentration	Major and Department
Law Day	Law Cardin Required	Law, Law

Degrees Awarded

In Progress

Juris Doctor

Curriculum Information

Primary Degree

Major	Major and Concentration
Law	Law Cardin Required

Institution Credit

Term : Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	527A	LW	CIVIL PROCEDURE	A	4.000	16.00		
LAW	530A	LW	CONTRACTS	B+	4.000	13.32		
LAW	535A	LW	TORTS	A+	4.000	17.32		
LAW	550A	LW	INTRODUCTION TO LEGAL RESEARCH	A-	1.000	3.67		
LAW	564A	LW	LAWYERING I	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	62.31	3.89
Cumulative	16.000	16.000	16.000	16.000	62.31	3.89

Term : Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	501B	LW	ADMINISTRATIVE LAW	B-	3.000	8.01		
LAW	506A	LW	CRIMINAL LAW	A	3.000	12.00		
LAW	528A	LW	CON LAW I: GOVERNANCE	A	3.000	12.00		
LAW	534A	LW	PROPERTY	A	4.000	16.00		
LAW	565A	LW	LAWYERING II	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	60.01	3.75
Cumulative	32.000	32.000	32.000	32.000	122.32	3.82

Term : Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	504R	LW	ENVIRONMENTAL ADVOCACY	A	2.000	8.00		I
LAW	508R	LW	ENERGY LAW	B+	2.000	6.66		
LAW	529A	LW	CON LAW II: INDIVIDUAL RIGHTS	A	3.000	12.00		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	556B	LW	ENVIRONMENTAL LAW	A	3.000	12.00		
LAW	572C	LW	BUSINESS ASSOCIATIONS	A-	3.000	11.01		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	14.000	14.000	14.000	13.000	49.67	3.82
Cumulative	46.000	46.000	46.000	45.000	171.99	3.82

Term : Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	504R	LW	ENVIRONMENTAL ADVOCACY	A	2.000	8.00		I
LAW	509S	LW	FIN & ACCT BASICS FOR LAWYERS	CR	2.000	0.00		
LAW	514A	LW	LEGAL PROFESSION	A+	2.000	8.66		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	533U	LW	LAW & POL OF REGULATORY SYSTEM	A+	3.000	12.99		
LAW	534B	LW	CONFLICT OF LAWS	A	2.000	8.00		
LAW	540U	LW	ALR: ENVIRONMENTAL LAW (DIS)	A-	1.000	3.67		
LAW	596F	LW	INCOME TAXATION	A+	3.000	12.99		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	13.000	54.31	4.18
Cumulative	62.000	62.000	62.000	58.000	226.30	3.90

Transcript Totals

Transcript Totals - (School of Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	62.000	62.000	62.000	58.000	227.33	3.99
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	62.000	62.000	62.000	58.00	227.33	3.99

Record of: Halina Russell Bereday
ID:: 802626252

Student Address:
Date of Birth: 02-Feb

Course Level: Undergraduate

High Schools Attended:
GROTON SCHOOL
GROTON MA
Degrees Awarded:
Bachelor of Arts May 22, 2021
Georgetown College
Major: Psychology
Minor: Environmental Studies
Minor: Religion/Ethics/World Affairs
Degree GPA: 3.776

Transfer Credit:
Advanced Placement
Prin Environmental Science 3.00
Math Statistics 4.00
School Total: 7.00
Entering Program:
Georgetown College
Bachelor of Arts
Major: Undeclared

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2017						
ENGL	106	Heroes and Vikings	3.00	B	9.00	
HIST	007	Intro Early Hist: Europe I	3.00	B+	9.99	
PSYC	001	General Psychology	3.00	A-	11.01	
SPAN	003	Introductory Spanish I	3.00	A	12.00	
THEO	001	The Problem of God	3.00	A-	11.01	
		Dean's List				

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	53.01	3.534

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2018						
HIST	099	Hist Focus: Oil & World Power	3.00	A-	11.01	
PSYC	151	Abnormal Psychology	3.00	A	12.00	
SPAN	004	Introductory Spanish II	3.00	B+	9.99	
THEO	102	Pilgrimage, Travel, & Tourism	3.00	A-	11.01	
WRIT	015	Writing and Culture	3.00	A	12.00	
		Second Honors				

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	56.01	3.734

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2018						
ECON	001	Econ Principles Micro	3.00	B+	9.99	
GOVT	060	International Relations	3.00	B+	9.99	
PHIL	010	Intro to Ethics	3.00	A-	11.01	
PSYC	002	Research Methods & Statistics	4.00	A-	14.68	
SPAN	021	Intermediate Spanish I	3.00	A	12.00	
		Dean's List				

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	16.00	16.00	57.67	3.604

Program Changed to:
Major: Psychology

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2019						
PHIL	159	Existentialism	3.00	A-	11.01	
PSYC	160	Childhood & Adolescence	3.00	A	12.00	
PSYC	234	Cognitive Neuroscience	3.00	A-	11.01	
SPAN	022	Intermediate Spanish II	3.00	A	12.00	
STIA	350	Gender, Env & Sustainability	3.00	A	12.00	
		Second Honors				

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	58.02	3.868

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2019						
GU/Charles Univ, Prague						
Beginning Czech Language, Fast Track I			3.00	A		
Tribal Myths and Traditions of the Czechs			3.00	A		
Psychology of Transition and Transformation			3.00	A		
Psychoanalysis and Society			3.00	A		
Introduction to the Kabbalah and Jewish Mysticism			3.00	A		
School Total:			15.00			

	EHrs	QHrs	QPts	GPA
Current	0.00	0.00	0.00	0.000

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2020						
ENST	110	Environment & Society	3.00	A	12.00	
INAF	196	ReExmn Isr-Pal Crisis:Lit/Film	3.00	A-	11.01	
JCIV	213	Debates Over Religious Freedom	3.00	A	12.00	
PSYC	364	Early Intervention Strategies	3.00	A	12.00	
PSYC	368	Children/Families/Law	3.00	A-	11.01	
Expanded S/CR/NC grade mode for Spring 2020 due to COVID19 Global Pandemic						
		Second Honors				

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	58.02	3.868

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Halina Russell Bereday
ID:: 802626252

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2020						
ENST	161	Urban Foraging and Ecology	1.00	A	4.00	
ENST	220	Issues in Environmental Scienc	3.00	A	12.00	
ENST	242	Environmental Action Workshop	2.00	A	8.00	
ENST	290	Environmental Communication	3.00	A	12.00	
ENST	383	ENST Journal Practicum	1.00	A	4.00	
GOVT	313	Reli, Ethic, World Aff	3.00	S	0.00	
PSYC	354	Theories of Therapy	3.00	A	12.00	

Expanded S/CR/NC grade mode for Fall 2020 due to COVID19 Global Pandemic
First Honors

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	52.00	4.000

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2021						
ENST	240	Issues in EnvironmentalJustice	3.00	A	12.00	
STIA	364	Env Security in the Arctic	3.00	A	12.00	

Expanded S/CR/NC grade mode for Spring 2021 due to COVID19 Global Pandemic

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	6.00	6.00	24.00	4.000
Cumulative	120.00	95.00	358.73	3.776

End of Undergraduate Record

Kathryn Frey-Balter, Esquire
Professor of the Practice
Managing Director, Lawyering Program
kfrey-balter@law.umaryland.edu
410.375.8764

Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

April 5, 2023

RE: Letter of Recommendation,
Halina Bereday

Dear Judge Walker:

I write in strong support of Halina Bereday's application for a judicial clerkship in your chambers for the 2024-2025 term. She is a superior legal writer who works thoroughly, quickly, and independently.

Ms. Bereday was a student in my Lawyering I class at the University of Maryland Francis King Carey School of Law in Fall 2021. Lawyering I is a fast-paced, demanding class which focuses on legal writing and encompasses a multitude of skills that are essential to lawyering. Students learn foundational legal analysis and writing through a series of drafts which culminate in two objective Memoranda and these contours form a strong foundation for a judicial clerkship. Ms. Bereday's written submissions in this class were those of a seasoned professional. She earned the highest score on the first memorandum, where I commended her "top-notch writing and analysis." Again, she earned one of the top scores on her second submission where I noted her writing was "near-perfect," and the depth of her analysis through the implied factors she unearthed were notably sophisticated.

In addition, she earned a "distinction" in Lawyering Skills for her outstanding performance on a mock client interview, client letter, and her leadership during in-class exercises. Ms. Bereday always made insightful contributions to classroom conversations. She has a stand-out legal mind.

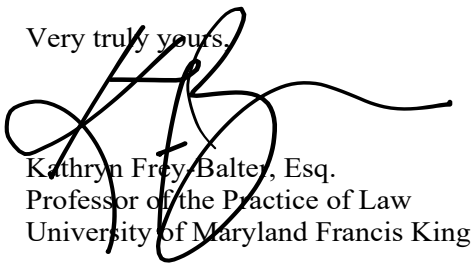
Unsurprisingly, Ms. Bereday earned a spot on our *Maryland Law Review*, her note on *West Virginia v. EPA* was selected for publication, and she was recently named Executive Editor. I have also heard from Ms. Bereday that she has excelled in both of her federal district court internships and has found the legal work in court to be fascinating and rewarding.

While I taught Ms. Bereday during the first semester of her first year, she has maintained a strong relationship with me. She reaches out for mentorship, absorbs feedback, and does not take her myriad successes for granted. That reflection and appreciation are markers of a great colleague. I am confident she would be a terrific addition to your judicial chambers.

I write with three decades' experience as a federal court practitioner, adjunct and full-time faculty member, and mentor. I am currently a Professor of the Practice and Managing Director of the Lawyering Program at the University of Maryland Carey School of Law. I was an Assistant Federal Public Defender at the Office of the Federal Public Defender for the District of Maryland for over a quarter-century (1992-2018). During that timeframe I was also an adjunct professor at University of Maryland Carey School of Law (Written and Oral Advocacy, twelve years during 2004-2020), and Catholic University, Columbus School of Law (Trial Practice, twelve years during 1998-2012). I was also a full-time faculty member at Stevenson University (Assistant Professor, Department of Law and Justice Studies, 2018-2020). As such, I am familiar with the traits one exhibits in academia that translate into professional success. I am confident that Ms. Bereday has the inquisitiveness, thoughtfulness, and work ethic that will make her an outstanding federal judicial clerk.

If you have any questions, feel free to contact me.

Very truly yours,



Kathryn Frey-Balter, Esq.
Professor of the Practice of Law
University of Maryland Francis King Carey School of Law

April 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to recommend Hallie Bereday for a clerkship with you. She is one of the most outstanding students I know well as demonstrated through her performance in class and her work as a research assistant to me.

I first met Hallie when she was a student in my first year Constitutional Law class during the Spring semester 2022. Hallie was one of the most frequent participants in class discussions, invariably making useful contributions to the dialogue. Thus, I was not surprised when, in a class of 64 students, Hallie's final examination received the sixth highest raw score, earning her a grade of "A".

I was so impressed with Hallie's performance that I hired her to be a research assistant for me during the summer of 2022. She performed exceptionally well in this position, writing outstanding memoranda on topics as diverse as the Dakota Access Pipeline, the history of the "major questions" doctrine, and how the Inflation Reduction Act amends the Clean Air Act. Hallie also did an exceptional job in helping me update the ninth edition of my environmental law casebook. As a result, I asked her to continue to serve as a research assistant during the 2022-23 academic year.

As a student in my Environmental Law class during the Fall 2022 semester, Hallie wrote a terrific final examination and received one of nine grades of "A" I awarded in a class of 39 students.

Hallie seems to have boundless energy and she is viewed as a leader by her fellow students. She is fiercely intelligent and has excellent research and writing skills. I know that she would make an exceptional law clerk.

Sincerely,

Robert V. Percival
Robert F. Stanton Professor of Law
Distinguished University Professor

Robert Percival - rpercival@umaryland.edu - (410) 706-8030

April 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Halina Bereday

Dear Judge Walker:

I am pleased to provide this strong recommendation for Halina Bereday, who expects to receive her juris doctor in May 2024 and has applied for a law clerk position in your chambers. Ms. Bereday is an outstanding student, with a lively intellect and a strong work ethic. She analyzes complex problems, researches them, and writes them up with skill and clarity significantly above her peers. She is indefatigable and always enthusiastic and curious. I am confident that she will become an excellent lawyer and would benefit greatly from her experience in your chambers.

I first got to know Ms. Bereday when she was a first-year student in my administrative law class. Although I strive to teach the course at a level accessible to first-year students, it is not for the faint of heart. Ms. Bereday participated actively in class, displaying a maturity about how people inside and outside the legal community view the disputes provoked by the government's role in society.

I was pleased to discover that, as a second-year student working on staff of The Maryland Law Review, Ms. Bereday elected to write a case note about West Virginia v. EPA, 142 S. Ct. 2587 (2022), a landmark decision that will have significant consequences for administrative law. West Virginia is a "major questions" case, and represents the first time that the Court discussed the doctrine using that label. It struck down a regulation under the Clean Air Act giving power plants the flexibility to decrease their greenhouse gas emissions through so-called "building blocks" that permitted fuel switching and trading among utilities. Surprisingly, the utilities were so enthusiastic about this approach that they intervened on behalf of the EPA before the Court. By then, implementing voluntary measures, they had met the targets first imposed by the Obama administrations but later rescinded by President Trump. The Court invalidated the regulation on the grounds that the EPA had gone beyond the statute to opine on topics of great economic significance for the energy industry and was not able to do so without a specific authorization by Congress that the Clean Air Act did not provide.

I became Ms. Bereday's faculty advisor as she wrote her Comment on this topic, while also following the academic commentary on the case. I was pleased to find that she was thinking about the case and its ramifications with the same level of sophistication as several other young scholars. Her article was selected by her peers for publication in the journal.

In spring 2023, Ms. Bereday enrolled in my advanced administrative law seminar, Law and Policy of the Regulatory System, where she and I did some more work on the article to make it more normative. It was exciting to watch her think through the ramifications of the decision from every angle, which is the advantage of continuing to work on a complex problem rather than shifting to another topic that receives less rigorous analysis. I will encourage her to write a shorter version that could be submitted to specialized, online sources for publication.
Ms. Bereday was an active participant in the class, politely challenging her peers as we considered regulatory case studies that reveal the challenges confronting government today. We had four outside experts attend the class, and she asked them perceptive questions that helped the class develop the lessons of each exploration.

Ms. Bereday attended Maryland Law on a full merits scholarship. Our resources are limited, and this distinction alone defined our expectations regarding her performance. She did not disappoint.

I am confident that Ms. Bereday will have a successful career as a lawyer and would take full advantage of the opportunity to begin that career as a judicial clerk. She is an exceptional young woman. Please do not hesitate to call me if you have any further questions at (301) 717-2405, which is my cell phone.

Sincerely,

Rena Steinzor
Edward M. Robertson Professor of Law

HALINA BEREDAY
1448 Sumwalt Ct., Baltimore, MD, 21230 | (813) 765-1667 | hbereday@umaryland.edu

WRITING SAMPLE

The attached writing sample is an opinion I wrote during my judicial internship with Judge Bennett in the Winter of 2023. With Judge Bennett's express recommendation, I have enclosed this memorandum order on a Motion for Compassionate Release which I wrote during my judicial internship in the U.S. District Court for the District of Maryland. The Background and Conclusion section has been omitted in the interest of brevity, and the opinion incorporates very minor edits from Judge Bennett.

MEMORANDUM ORDER

In 1994, Defendant Shelley Martin ("Martin") and his co-defendants trafficked narcotics, carried out robberies, and engaged in four murders. (Presentence Investigation Report ("PSR") ¶ 8.) On December 10, 2008, a jury acquitted Martin of murder but found him guilty of (1) Racketeering Conspiracy in violation of 18 U.S.C. § 1962(d) and Conspiracy to Distribute and Possess with Intent to Distribute Drugs in violation of 21 U.S.C. § 846. (Judgement, ECF No. 650.) On March 30, 2009, this Court[1] sentenced Martin to 400 months imprisonment. *Id.* On July 27, 2021, this Court amended Martin's sentence to 300 months pursuant to the First Step Act. Pub. L. No. 115–391, 132 Stat. 5194. (*See* Amended Judgement, ECF No. 869; Reason for Amended Judgement, ECF No. 870.) Martin's present release date is on or about November 16, 2025. (Medical Notice, ECF No. 882.)

On February 14, 2022, Martin pro se filed a Motion for Compassionate Release. (ECF No. 875.) On October 10, 2022, Martin pro se filed a Motion to Amend under FRCP Rule 15(a), including his amended Motion in these filings.[2] (ECF Nos. 880, 880-2.) Through these filings, Martin argues that his sickle-cell anemia leaves him susceptible to COVID-19, and that recent changes in sentencing law would result in a lesser sentence if he was convicted today. (Motion for Compassionate Release, ECF No. 875; Amended Motion for Compassionate Release, ECF No. 880-2.) With respect to factors under 18 U.S.C. § 3553(a), Martin argues that his personal circumstances, rehabilitation, and reentry plan weigh in favor of compassionate release. *Id*. This Court has reviewed Martin's Motions and supporting memorandum and finds no hearing is

[1] Defendant was originally sentenced by the Honorable Andre M. Davis, who has since retired. Thereafter, the case was reassigned to the undersigned.

[2] This Court hereby grants Martin leave to amend and shall consider Martin's amended Motion for Compassionate Release alongside his original Motion for Compassionate Release. (ECF No. 880-2, ECF No. 875.)

necessary. *See* Local Rule 105.6 (D. Md. 2021). For the reasons that follow, Martin's Motion for Compassionate Release is **DENIED**.

ANALYSIS

As Martin has filed his motion pro se, his arguments are afforded a liberal construction. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (holding that pro se filings are "held to less stringent standards than formal pleadings drafted by lawyers" (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1975))); *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194, established significant changes to the procedures involving compassionate release from federal prison. Prior to the First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i) provided the Bureau of Prisons ("BOP") with sole discretion to file compassionate release motions with the Court. With the passage of the First Step Act, defendants are now permitted to petition federal courts directly for compassionate release whenever "extraordinary and compelling reasons" warrant a reduction in sentence. The Act permits a defendant to seek a sentence reduction after he "has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). Once these mandatory conditions are satisfied, this Court may authorize compassionate release upon a showing of "extraordinary and compelling reasons" warranting a reduction and after weighing the factors presented in 18 U.S.C. § 3553(a). 18 U.S.C. § 3582(c)(1)(A)(i).

I. Administrative Exhaustion Requirements

Martin has satisfied the preconditions to filing his Motion for Compassionate Release. On November 22, 2021, Martin submitted a "Request for Administrative Remedy" addressed to the

warden of his facility requesting the warden to file a motion for compassionate release on his behalf. (Compassionate Release Documents of Exhaustion, ECF No. 879-1.) On February 23, 2022, Warden B.M. Trate denied Martin's request for Compassionate Release.[3] *Id.* As 30 days have elapsed since Martin's request was submitted to the warden, his motion is properly before this Court. *See* 18 U.S.C. § 3582(c)(1)(A).

II. Extraordinary and Compelling Reasons

The United States Sentencing Commission is charged with defining "what should be considered extraordinary and compelling reasons for sentence reduction" under 18 U.S.C. § 3582(c)(1)(A). 28 U.S.C. § 994(t). Of relevance here, the Commission has determined that "extraordinary and compelling reasons" exist where a defendant is "suffering from a serious physical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he is not expected to recover." U.S.S.G. § 1B1.13 cmt. n.1(A). Similarly, a defendant who is "(i) at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less," faces extraordinary and compelling circumstances that may justify release. U.S.S.G. § 1B1.13 cmt. n.1(B). Finally, the Commission has authorized the Bureau of Prisons to identify other extraordinary and compelling reasons "other than, or in combination with" the reasons identified by the Commission. U.S.S.G. § 1B1.13 cmt. n.1(D).

Although potentially useful guides, neither the Sentencing Commission's Guidelines nor the Bureau of Prisons' regulations constrain this Court's analysis. *United States v. McCoy,* 981

[3] Warden Trate denied Martin's request only after Martin filed the instant motion. Regardless, 30 days have elapsed since Martin's request was made and Martin's motion is properly before this Court. *See* 18 U.S.C. § 3582(c)(1)(A).

F.3d 271, 281 (4th Cir. 2020) (holding that U.S.S.G. § 1B1.13 is not an "applicable policy statement" for compassionate release motions filed by a defendant in the wake of the First Step Act). As Judge Blake of this Court has recognized, the First Step Act embodies Congress's intent to reduce the Bureau of Prisons' authority over compassionate release petitions and authorizes the district courts to exercise their "independent discretion to determine whether there are 'extraordinary and compelling reasons' to reduce a sentence." *United States v. Bryant*, CCB-95-0202, 2020 WL 2085471, at *2 (D. Md. Apr. 30, 2020); *accord McCoy*, 981 F.3d at 281 (holding that "the First Step Act allows courts independently to determine what reasons, for purposes of compassionate release, are 'extraordinary and compelling'").

Martin offers two potential "extraordinary and compelling" reasons to consider his motion. First, Martin suffers from sickle cell anemia, a condition that increases his risk to Covid-19. (Initial Motion for Compassionate Release, ECF No. 875.) Second, Martin argues that changes in sentencing law would impose a shorter sentence on Martin if he was convicted today. (Amended Motion for Compassionate Release, ECF No. 880-2.) Martin also notes he has served twenty years of his sentence. (Initial Motion for Compassionate Release, ECF No. 875.) This Court finds Martin's sickle cell anemia is "extraordinary and compelling," as explained below.

This Court has determined that a heightened susceptibility to COVID-19 may contribute "extraordinary and compelling" reasons for a sentence reduction. See, e.g., *United States v. Hurtt*, 14-0479, 2020 WL 3639987, at *1 (D. Md. July 6, 2020). However, "the coronavirus is not tantamount to a get out of jail free card." *United States v. Hiller*, 18-0389, 2020 WL 2041673, at *4 (D. Md. Apr. 28, 2020). For Covid-19 to be an "extraordinary and compelling" circumstance, the defendant must allege that they have a medical condition that puts them at higher risk, or that they have taken measures, such as vaccination, to protect themselves. *See United States v. Petway*,

No.21-6488, 2022 WL 168577 at *2 (D.Md. 2022) (considering individual's "particularized susceptibility" and Covid-19 vaccination status to evaluate if Covid-19 is "extraordinary and compelling"). Here, Martin has alleged that he has sickle-cell disease, a genetic disease that causes a shortage of blood cells and leaves him vulnerable to infection. (Initial Motion for Compassionate Release, ECF No. 875.) The government does not contest that this condition leaves Martin susceptible to COVID-19. This vulnerability constitutes an extraordinary and compelling circumstance that warrants considering his motion.

Addressing Martin's second alleged extraordinary and compelling circumstance, Martin argues that sentencing law has changed since he was convicted, and that this change would lessen his sentence had he been convicted today. (Amended Motion for Compassionate Release, ECF No. 880-2.) Intervening developments in sentencing law may constitute extraordinary and compelling reasons that justify a motion for a sentence reduction. *See, e.g.*, *United States v. Day*, 474 F. Supp. 3d 790, 798 n.16 (E.D. Va. 2020) (collecting cases); *United States v. Parker*, 461 F. Supp. 3d 966, 979–81 (C.D. Cal. 2020); *United States v. Smith*, 379 F. Supp. 3d 543, 546 (W.D. Va. 2019) ("Congress, when drafting the First Step Act in 2018, surely did not intend for courts to disregard the last six years of Supreme Court federal sentencing jurisprudence and this court declines to do so."). Among such changes, the Supreme Court has held that any facts used to raise the statutory maximum or mandatory minimum penalty for a crime must be established by a jury beyond a reasonable doubt—not found by the judge on the preponderance of the evidence. *Alleyne v. United States*, 570 U.S. 99, 108 (2013).

Martin incorrectly argues that *Alleyne* applies in his case and is "extraordinary and compelling." (ECF No. 880-2.) Martin was convicted of Racketeering Conspiracy based on predicate offenses of murder, armed robbery, and drug trafficking after a 36-day jury trial. (PSR ¶

1, 38.) Martin's base offense level of 43 was based on the jury conviction alone and was calculated on January 22, 2009. (PSR 2a, ¶ 38.) Martin's base offense level was established at his March 27, 2009 sentencing, at which time Judge Davis found that by the preponderance of the evidence, "Mr. Martin was there, that he had knowing involvement [as to the murder charges.]"[4] (Sentencing Transcript 45, ECF No. 710.) Further, Judge Davis granted Defendant a one level *downward* departure from offense level 43 to offense level 42 because "a life sentence in the case of this defendant would be more harsh than is warranted under the circumstances." (Statement of Reasons, ECF No. 651 *SEALED*.) *Alleyene* thus is not applicable here, as there were no "facts used to raise the statutory maximum or mandatory minimum penalty for a crime" that were not "established by a jury beyond a reasonable doubt." *Alleyne*, 570 U.S. at 108. As this Court finds that Martin's sickle-cell disease is sufficiently "extraordinary and compelling" to warrant considering his motion, this Court will address the 18 U.S.C. § 3553(a) factors.

III. 18 U.S.C. § 3553(a) Factors

A court must conduct an "individualized assessment" of a defendant's circumstances under 18 U.S.C. § 3553(a) to determine whether he is eligible for a sentence reduction. *McCoy*, 981 F.3d at 286. These factors require this Court to consider: (1) the defendant's personal history and characteristics; (2) his sentence relative to the nature and seriousness of his offense; (3) the need for a sentence to provide just punishment, promote respect for the law, reflect the seriousness of the offense, deter crime, and protect the public; (4) the need for rehabilitative services; (5) the applicable guideline sentence; and (6) the need to avoid unwarranted sentencing disparities among

[4] As the Honorable Andre M. Davis explained at sentencing: "[T]he jury's decision not to convict Mr. Martin on the murder counts reflects at the least the jury's decision not just that the evidence as to Mr. Martin was insufficient, but that there is some cognizable difference between Mr. Martin and the other three defendants. [. . .] I believe that Mr. Martin was there, that he had knowing involvement, so I find by a preponderance of the evidence [that Martin was involved in murder]." (ECF No. 710.)

similarly-situated defendants. 18 U.S.C § 3582(c)(1)(A); 18 U.S.C. § 3553(a). On balance, the 18 U.S.C. § 3553(a) factors do not justify compassionate release.

There are some factors that favor Martin's release. First, Martin was a younger man at the time he was convicted. (Government Response 12, ECF No. 864.) He was convicted at age twenty-four and is now forty-four. (Cover Letter, ECF No. 880-1.) Further, Martin presents evidence that he has been rehabilitated during the twenty intervening years. While in prison, Martin has completed drug education, non-residential drug treatment, a 500-hour residential drug treatment program, and classes on work habits, forklift safety, decision-making, alternatives to violence, and anger management. (ECF Nos. 859-2, 859-3, 859-5, 859-6, 875, 880-1.) Martin also has a promising reentry plan. (ECF Nos. 880-1, 859-7.) Upon release, he plans to reside with his father and stepmother in New Port Richey, Florida, away from the negative influences he faced in Maryland. (ECF Nos. 859-1, 859-7, 859-8.) His stepmother is the CEO of the End Recidivism Project, and she has pledged to "assist [Martin] with transitional housing, education, job and honing in on core values which will assist him in being productive in a positive way." (ECF No. 859-7.)

While Martin's rehabilitation efforts and reentry plan are commendable, on balance, this Court concludes that Martin's instant arguments do not warrant compassionate release. Less than two years ago, this Court held that Martin was not eligible for immediate release "given the serious nature of Martin's offenses, the strength of the evidence against him, and his recidivist past." (Order Granting Reduction in Sentence, ECF No. 868.) Martin has not done anything substantial to tip the balance of these factors, and there are strong arguments remaining against Martin's immediate release.

First, the nature and circumstances of Martin's offenses are serious. Martin and his co-Defendants trafficked large quantities of drugs, including cocaine and heroin, and were involved in the commission of multiple robberies that resulted in the gruesome killing of four people by gunshot to the back of the head. (*See* PSR ¶¶ 8, 13, 15, 16 18-21.) Further, while Martin was acquitted at trial of the murder charges, Judge Davis noted that "Martin was there [and] . . . had knowing involvement [in the murders.]" (Sentencing Transcript 45, ECF No. 710.) Judge Davis' finding is relevant to this Court's analysis of the nature and circumstances of Mr. Martin's offense and weighs against compassionate release.

Martin's personal history and characteristics also weigh against release. This was not Martin's first drug conviction. He has two prior adult convictions, one conviction for narcotics trafficking and one conviction for possession of a firearm by a convicted felon. (PSR ¶¶ 45-48.) He has numerous juvenile offenses and fourteen prior arrests. (*Id.* ¶¶ 51-66.) Further, Martin's disciplinary history, both in prison and on supervised release, is poor.[5] (Gov. Resp., ECF No. 864.) Martin's criminal activity was continuous until he received the federal sentence he is currently serving. This weighs against compassionate release.

As for "the need for a sentence to provide just punishment, promote respect for the law, reflect the seriousness of the offense, deter crime, and protect the public," this factor weighs against compassionate release. Martin is prone to recidivism and has several serious prior convictions and a lengthy criminal history. (Gov. Resp., ECF No. 864.) More recently, upon completion of Martin's intensive 500-hour drug program, Martin's Specialty Treatment Specialist noted that

[5] Martin's disciplinary history in prison includes seventeen disciplinary infractions, including seven citations for possession of narcotics or alcohol, two citations for possessing a dangerous weapon, and three citations for fighting. Specifically, Martin has: used free weights to strike another inmate; was involved in a fight where an inmate was stabbed eight times; and was found with drugs such as amphetamines, K2, and marijuana. (BOP Inmate Disciplinary Record, ECF No. 864-1.)

Martin is likely to relapse if he is exposed to peers who engage in criminal behavior and substance abuse. (Medical Notice, ECF No. 882.) Accordingly, it is only rational to conclude that incarceration is still necessary to dissuade Martin from future offenses and to protect the public.

Applicant Details

First Name	**Jonathan**
Last Name	**Bertulis-Fernandes**
Citizenship Status	**U. S. Citizen**
Email Address	**bertulij@bc.edu**
Address	**Address** Street **36 Brookside Avenue #3** City **Boston** State/Territory **Massachusetts** Zip **02130** Country **United States**
Contact Phone Number	**6513837807**

Applicant Education

BA/BS From	**University of St. Andrews**
Date of BA/BS	**June 2015**
JD/LLB From	**Boston College Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12201&yr=2011**
Date of JD/LLB	**May 31, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Boston College Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Foundation; The Appellate Project**

Recommenders

Bilder, Mary
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Romano, Nathaniel
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Chirba, MaryAnn
maryann.chirba@bc.edu
781-697-2233

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jonathan Bertulis-Fernandes
36 Brookside Avenue #3
Boston, MA 02130

06/11/2023

The Honorable John Walker
United States Court of Appeals, Second Circuit
Connecticut Financial Center
157 Church Street, 17th Floor
New Haven, Connecticut 06510-2100

Dear Judge Walker:

I am a rising third-year law student and Public Service Scholar at Boston College Law School, where I am also Editor in Chief of the *Boston College Law Review*. I am writing to apply for a clerkship in your chambers for the 2024-25 term, where I would be thrilled to have the opportunity to lay the foundation for my future career as an advocate.

Throughout my life, I have been driven by a central commitment to public service: whether co-founding a charity in London that saved a vital community resource in the U.K.'s most impoverished borough or expanding the provision of essential legal services that reached more than 100,000 New Yorkers each year. I have served in elected office and worked for a former U.S. President, a U.S. Senator, and for the U.K. Government. At the same time, my first-hand experience as a second-generation immigrant and as someone with a disability affords me further unique perspectives on how the law impacts individuals and society.

In law school, I have seized every available opportunity to develop my research, writing, and leadership skills. I am a research assistant in the area of administrative law and serve as Co-President of the South Asian Law Students Association. During my 2L year, I have also represented clients as a student attorney in the Civil Rights Clinic, where I brought a class action suit against the Massachusetts Department of Correction.

I would greatly appreciate the opportunity to discuss my interests and qualifications with you in further detail. Enclosed, please find my application materials, including my resume, writing sample, law school transcript (top 5% in class), and undergraduate transcript. Separately, please also find letters of recommendation from Professors Mary Bilder, Nathaniel Romano, Mary Ann Chirba, and Reena Parikh. Please feel free to contact me at (651) 383-7807 or by email at bertulij@bc.edu if you require any further information. Thank you for your consideration.

Respectfully,

Jonathan Bertulis-Fernandes

Enclosures

Jonathan Bertulis-Fernandes

36 Brookside Avenue #3, Boston, MA 02130
bertulij@bc.edu - (651) 383-7807 – *He/Him/His*

EDUCATION

Boston College Law School Newton, MA
Candidate for Juris Doctor May 2024
GPA: 3.936/4.00 (top 5% in class)
Honors: Boston College Law Review, Editor in Chief (2023-24); Public Service Scholar (one of three in class of 350); Academic Success Program Peer Coach (2022-23); Research assistant to Prof. Bijal Shah (2023-).
Activities: South Asian Law Students Assn., Co-President.; Disability Law Students Assn.; Public Interest Law Fdn.

Emory University Atlanta, GA
Non-degree scholarship program August 2015 – July 2016
GPA: 4.0/4.0
Honors: Robert T. Jones Memorial Scholarship (awarded to four top graduating students from St Andrews).

University of St Andrews Scotland, U.K.
Master of Arts (with Honours), International Relations & Social Anthropology September 2011 – June 2015
Honors: First Class Honours (highest degree classification); Three Deans' List Citations; Nisbet Prize for International Relations (top performance in class of 330).
Study Abroad: Hong Kong University (2013) and Københavns Universitet (2014).

PROFESSIONAL EXPERIENCE

ACLU of Massachusetts Boston, MA
Incoming Summer Legal Intern Summer 2023

Boston College Law School, Civil Rights Clinic Newton, MA
SJC Rule 3:03 Certified Student Attorney August 2022 – May 2023
- Represent non-citizens, incarcerated individuals, and low-wage workers experiencing exploitation and discrimination, including bringing class action suit against MA Department of Correction in Superior Court.
- Provide legal, policy, and other technical assistance to worker centers, local unions, and immigrant advocacy groups, in support of their legislative priorities and other organizing campaigns.

Massachusetts Appleseed Center for Law and Justice Boston, MA
Summer Law Fellow Summer 2022
- Led research to support initiatives related to increasing access to justice, interrupting the school-to-prison pipeline, and assisting youth experiencing homelessness.
- Wrote legal memoranda including on Massachusetts civil rights law and anti-discrimination protections.

The Legal Aid Society New York, NY
Grant Writer (Civil Practice) January 2018 – June 2021
- Led initiatives to scale-up services to New York's immigrant communities in response to the Trump Administration's immigration policies and formulated response to COVID-19 pandemic.
- Worked with senior leadership to develop funding proposals for 21 practice areas including immigration, family law/domestic violence, and affirmative law reform litigation, bringing in $75 million in new funding.

The Carter Center Atlanta, GA
Administrative Assistant (Health, Peace and Education Programs Development) September 2016 – March 2017
- Drafted and edited briefings and talking points for President Carter and other senior management ahead of meetings and engagements with heads of state and foreign government ministers.

U.S. Senator Johnny Isakson Atlanta, GA
Congressional Intern (offer extended for permanent position) January 2016 – August 2016
- Performed legislative and policy research on issues and assisted with official correspondence, constituent services, and coordinating delegation to Presidential Inauguration.

Home Office – Director General's Office, Border Force London, U.K.
Executive Officer June 2015 – August 2015
- Supported the Director General and assisted with policy formulation related to counterterrorism and national security. Wrote briefings, compiled and edited ministerial reports, and responded to press inquiries.

SELECTED VOLUNTEER AND OTHER ADDITIONAL EXPERIENCE

Friends of Kensal Rise Library Ltd London, U.K.
Trustee 2011 – Present
- Founding trustee of local charity set up to run community library following closure; run public relations and fundraising efforts ensuring continuing library operations.
- Created new model for community resource by operating library as wider resource hub connecting individuals to services and conducting community programming, including English as a second language classes and workforce development.

Coalition for the Homeless New York, NY
Driver and Crew Member - Grand Central Food Program January 2018 – August 2021
- Drove van as part of meal distribution program serving over 1,000 food-insecure individuals and New Yorkers experiencing homelessness while connecting them with additional services, such as shelter, assistance with accessing benefits, and case and social workers.

TEDxEmory Atlanta, GA
Speaker 2016
- Developed TED talk on experience of having a stutter and expanding comfort zone; presented to audience of 1,000 people. https://www.youtube.com/watch?v=BSRtEtkg670.

The Royal Burgh of St Andrews St Andrews, U.K.
Community Councilor October 2014 – August 2015
- Elected to the Community Council to represent 16,000 residents and act as bridge to local government.
- Scrutinized council strategy and sat on sub-committees including planning and finance.

Willesden District Scout Council London, UK London, U.K.
Nominated Trustee and Executive Committee Member 2009 – 2013
- Governance role in provision of Scouting for more than 400 young people (gender inclusive) in area of North-West London. Managed approximately 40 volunteers.

BOSTON COLLEGE

Office of Student Services
Academic Transcript

Boston College
Office of Student Services
Lyons Hall 103
140 Commonwealth Avenue
Chestnut Hill, MA 02467

NAME : JONATHAN J BERTULIS-FERNANDES
SCHOOL : LAW SCHOOL
DEGREE : CANDIDATE FOR JURIS DOCTOR
GRADUATE DISCIPLINE : LAW

STUDENT ID#: 84853405
DATE PRINTED: 06/10/2023

FALL 2021 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2110	CRITICAL PERSPECTIVES IN LAW AND PROFESSIONAL IDENTITY	01	01	P
LAWS2120	CIVIL PROCEDURE	04	04	A
LAWS2130	CONTRACTS	04	04	A
LAWS2140	PROPERTY	04	04	A
LAWS2150	LAW PRACTICE 1	03	03	A-

			ATT	EARN	UNITS
TERM GPA:	3.934	TERM TOTALS:	16	16	15
CUM GPA:	3.934	CUM TOTALS:	16	16	15

SPRING 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2125	CONSTITUTIONAL LAW	04	04	A
LAWS2135	CRIMINAL LAW	04	04	A
LAWS2145	TORTS	04	04	A
LAWS2155	LAW PRACTICE II	02	02	A
LAWS8065	INTRO RESTORATIVE JUSTICE	03	03	A

			ATT	EARN	UNITS
TERM GPA:	4.000	TERM TOTALS:	17	17	17
CUM GPA:	3.969	CUM TOTALS:	33	33	32

FALL 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS8970	CIVIL RIGHTS CLINIC	07	07	A
LAWS9109	ORWELL'S NIGHTMARE: UNITED STATES LAW AND THE SUPPORT OF ANTI-BLACK RACISM	02	02	A
LAWS9996	EVIDENCE	04	04	B+
LAWS9999	LAW REVIEW	01	01	P

			ATT	EARN	UNITS
TERM GPA:	3.794	TERM TOTALS:	14	14	13
CUM GPA:	3.918	CUM TOTALS:	47	47	45

SPRING 2023 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS3343	ADVANCED CIVIL RIGHTS PRACTICE	03	03	A
LAWS4310	HOUSING LAW AND POLICY SEMINAR	03	03	A
LAWS7731	ADMINISTRATIVE LAW	03	03	A
LAWS9943	CRIMINAL PROCEDURE	03	03	A
LAWS9999	LAW REVIEW	03	03	P

			ATT	EARN	UNITS
TERM GPA:	4.000	TERM TOTALS:	15	15	12
CUM GPA:	3.936	CUM TOTALS:	62	62	57

FALL 2023 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2192	PROF&MORAL RESPONSIBILITY	03	00	IN PROGRESS
LAWS4444	LOCAL GOVERNMENT LAW	03	00	IN PROGRESS
LAWS7792	FEDERAL COURTS	03	00	IN PROGRESS
LAWS9100	RACE,POLICING&CONSTITUT.	02	00	IN PROGRESS

			ATT	EARN	UNITS
TERM GPA:	0.0	TERM TOTALS:	11	00	00
CUM GPA:	3.936	CUM TOTALS:	73	62	57

TOTAL CREDITS EARNED : 62 CUM GPA : 3.936

END OF RECORD

ISSUED TO : JONATHAN J BERTULIS-FERNANDES
36 BROOKSIDE AVENUE
APARTMENT 3
JAMAICA PLAIN
MA

Bryan D. Jones
University Registrar

University of St Andrews | FOUNDED 1413

Academic Transcript in the Faculty of Arts
of
Jonathan Bertulis-Fernandes

Date of birth: 27 September 1991 **Student number:** 100002528

Key to grades: A = Audited, D = Deferred, E = Exempt; F = Failed, M = Decanal intervention, P = Passed, PC = Grade capped, S = Special circumstances, SP = Special circumstances due to COVID-19 pandemic, V = Void - mitigating circumstances, X = Failed requirements, XC = Failed - right to retake module for credit only, XN = Failed - no right to take additional module, XR = Failed - right to take another module for credit only, Z = Unreported

Year	Programme and main fields of study / Module level, code and title		University of St Andrews credits possible	University of St Andrews credits gained	ECTS credits gained	Module Assessments Mark / Grade Attempt 1	Attempt 2
	2011/2	Master of Arts (Honours) Geography					
1000	GG1001	The Foundations of Geography	20	20	10	15.8 P	
1000	GG1002	Global Environmental Problems	20	20	10	15.0 P	
1000	IR1005	Introduction to International Relations	20	20	10	15.6 P	
1000	IR1006	Foreign Policy Analysis and International Security	20	20	10	16.5 P	
1000	SA1001	Anthropology in the World	20	20	10	16.5 P	
1000	SA1002	Ways of Thinking	20	20	10	17.7 P	
	Credits for academic session		**120**	**120**	**60**		
	2012/3	Master of Arts (Honours) International Relations and Social Anthropology					
2000	GG2011	Geographical Processes and Change	30	30	15	15.2 P	
2000	IR2005	Theoretical Approaches to International Relations	20	20	10	17.0 P	
2000	IR2006	Issues in International Relations	20	20	10	18.0 P	
2000	SA2001	The Foundations of Human Social Life	20	20	10	16.5 P	
2000	SA2002	Ethnographic Encounters	20	20	10	17.0 P	
1000	SP1030	Introduction to Modern Latin America	10	10	5	16.0 P	
	Credits for academic session		**120**	**120**	**60**		
	2013/4	Master of Arts (Honours) International Relations and Social Anthropology					
3000	IR301F	Study Abroad: International Relations (12)	12	12	6	17.0 P	
3000	IR303F	Study Abroad: International Relations (12)	12	12	6	16.0 P	
3000	IR305F	Study Abroad: International Relations (12)	12	12	6	17.0 P	
3000	IR307F	Study Abroad: International Relations (12)	12	12	6	16.0 P	
3000	IR309F	Study Abroad: International Relations (12)	12	12	6	16.0 P	
3000	SA302J	Study Abroad: Social Anthropology (15)	15	15	7.5	18.0 P	
3000	SA302R	Study Abroad: Social Anthropology (30)	30	30	15	15.0 P	
3000	SA304J	Study Abroad: Social Anthropology (15)	15	15	7.5	18.0 P	
	Credits for academic session		**120**	**120**	**60**		
	2014/5	Master of Arts (Honours) International Relations and Social Anthropology					
4000	IR4099	Honours Dissertation in International Relations	60	60	30	17.2 P	
4000	SA4005	The West Indies and the Black Atlantic	30	30	15	17.2 P	
4000	SA4857	West Africa	30	30	15	17.3 P	
	Credits for academic session		**120**	**120**	**60**		

University of St Andrews | FOUNDED 1413

Academic Transcript in the Faculty of Arts
of
Jonathan Bertulis-Fernandes

Date of birth: 27 September 1991 **Student number:** 100002528

Key to grades: A = Audited, D = Deferred, E = Exempt; F = Failed, M = Decanal intervention, P = Passed, PC = Grade capped, S = Special circumstances, SP = Special circumstances due to COVID-19 pandemic, V = Void - mitigating circumstances, X = Failed requirements, XC = Failed - right to retake module for credit only, XN = Failed - no right to take additional module, XR = Failed - right to take another module for credit only, Z = Unreported

Year	Programme and main fields of study / Module level, code and title	University of St Andrews credits possible	University of St Andrews credits gained	ECTS credits gained	Module Assessments Mark / Grade Attempt 1	Attempt 2
	Total Credits on this programme	480	480	240		

Grade point average (GPA) = 16.8 out of 20.0 possible

Final Award: **Master of Arts (Honours) International Relations and Social Anthropology**

Award Classification: **First Class**

Date of Award: **23rd of June 2015**

Students at the University of St Andrews have the opportunity to engage in both co-curricular and extra-curricular activities which may contribute to the life of the University and the wider community as well as to their own personal and professional development. The achievements reported here have been verified by the University of St Andrews and information on the approvals process used to verify data for inclusion in this section can be found at www.st-andrews.ac.uk/students/awards

Academic Prizes

2014/5 Deans' List

Awarded to students who average above 16.5 in all modules across the academic year.

2013/4 Deans' List

Awarded to students who average above 16.5 in all modules across the academic year.

2012/3 Deans' List

Awarded to students who average above 16.5 in all modules across the academic year.

2012/3 Nisbet Prize (International Relations)

Awarded for performance in International Relations.

Placements / Exchanges / Study Abroad

2013/4 Erasmus Study Abroad

An optional semester/year abroad studying at one of the University's Erasmus exchange partners.

2013/4 Study Abroad

An optional semester/year abroad studying at one of the University's international partners.

I hereby certify that the foregoing is a true transcript of the academic record of Jonathan Bertulis-Fernandes in the University of St Andrews

Authorised signature Marie-Noël Easley

Official capacity *Academic Registrar*

Official stamp or seal
Registry

From session 2009/10, the University of St Andrews implemented a new grading scheme moving the pass mark from 5.0 to 7.0 for all its degrees.
For full grading information please go to
www.st-andrews.ac.uk/administration/academicdatateam/assessmentandawards/gradingsheets/

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Candidacy of Jonathan Bertulis-Fernandes

Dear Judge Walker:

I am delighted to write this clerkship recommendation for my former student, Jonathan Bertulis-Fernandes. He is just a marvelous person and already an academic superstar here. He is a master of legal analysis with perfect A's across all of the big first year classes, combined with compassion and a profound capacity to meet challenges at the highest level. He will be an amazing clerk.

I was fortunate to have Jonathan in class in his first semester in law school and he stood out in the large (masked) first-year property class. He was always prepared, capable of offering both precise answers to legal doctrine as well as thoughtful insights and reflections. Despite his exceptional prior academic record with First Class Honors at St. Andrews, Jonathan was uncertain about whether he would excel to the same degree. I had absolutely no doubt based on his outstanding performance in class and office hours—and as his top 5% placement in the class shows, law school exams presented no difficulty. Jonathan has a commitment to work and preparation, and the analytical insight that one sees in the very finest lawyers. When Jonathan spoke in class, everyone wrote down what he said and I never needed to add anything to his comments.

Jonathan has already made an incredible mark on BC Law. He is a Public Service Scholar—a full tuition scholarship awarded to exceptional students who are deeply committed to practicing public interest law. He is co-President of the South Asian Law Students Association and involved with the Disability Law Students Association. Jonathan is Editor in Chief of the Boston College Law Review, and I know he is held in great esteem there. He is an Academic Success Program Peer Tutor (a very competitive position)—and I have observed him on many afternoons patiently helping 1L students. In every dimension, Jonathan has established himself as a student leader. But one cannot imagine a more modest student leader—it was only in writing this letter that I came to appreciate the vast depth of his experience (including working at The Carter Center and Legal Aid) and his real commitment to volunteering in meaningful and transformative ways (including a long time with the Coalition for the Homeless's Grand Central Food Program).

Jonathan comes to law deeply aware of the power of law to burden and help people. As he explained to me, he "grew up in London, in what is one of the most impoverished and diverse neighborhoods of the United Kingdom." At 16 years of age, he won an academic scholarship to attend a private school and then went on to his exceptional career at St. Andrews. He later co-founded a community non-profit in his neighborhood of London (Friends of Kensal Rise Library) to help save the local library, which after legal actions, was chosen to run the library. This experience led Jonathan to see the law as a potential instrument of empowerment for social inequities. Jonathan is going to do amazing work as a lawyer dedicated to a vision of social justice.

I am so happy that Jonathan has decided to pursue clerking. I know that he will be an exceptional clerk. I hope that you will consider him for a place in your chambers.

Sincerely,

Mary Sarah Bilder
Founders Professor of Law
bilder@bc.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Candidacy of Jonathan Bertulis-Fernandes

Dear Judge Walker:

I am thrilled to provide a recommendation for Jonathan Bertulis-Fernandes as part of his judicial clerkship application. I am an Assistant Clinical Professor at Boston College Law School and Director of the Civil Rights Clinic. Jonathan has been a student attorney in my Civil Rights Clinic since August 2022, so I have had the absolute pleasure of working closely with and supervising him for approximately six months. During his time in the clinic, Jonathan has drafted numerous legal documents that have allowed me to observe his excellent legal research, writing and analysis skills. These documents include numerous legal memoranda on issues of statutory and constitutional law, discovery requests, filings related to motion practice, and a brief in support of class certification in a complex civil rights matter. In my nearly five years of teaching, Jonathan is easily among the top 5% of students I have ever taught or supervised for many reasons that I hope my letter will illuminate.

Jonathan has not ceased to impress me with his ability to produce the highest quality work for our clinic clients, requiring little editing from me, even at this early stage in his legal career. He routinely finds probative cases and authorities that other students have difficulty finding and has an uncanny ability to distill complex legal principles and communicate them clearly to colleagues and clients alike. Additionally, on numerous occasions, Jonathan has identified important legal arguments and crafted creative legal theories to advance our clients' interests that were overlooked by other members of our legal team. I have been a practicing attorney for a little over a decade, and Jonathan, despite being a law student, often exhibits greater analytical abilities and professional judgment than some of the junior attorneys I have mentored. Lastly, his legal writing is top-notch; it is clear, compelling, well-organized and concise. Simply put, it is a joy to read Jonathan's writing.

Jonathan's professional maturity in the workplace is commendable and will serve him well as a judicial law clerk. I have seen first-hand how effectively he manages his time and meets competing deadlines, all while producing stellar work. This is what makes him stand apart from other law students, who often excel in a few but not all of these areas. The Civil Rights Clinic is one of the most challenging and demanding educational experiences at Boston College Law School, and Jonathan has excelled in this clinic for two semesters while maintaining a 3.9 GPA, being on law review and serving as a student leader on campus. Additionally, I see Jonathan's leadership and collaboration skills daily, as he deftly works with his fellow clinic students, co-counsel at a large law firm, and clients to meaningfully incorporate everyone's input into cohesively written work products. I clerked for a federal judge in a U.S. District Court and am acutely aware of the organizational and professional skills a judicial law clerk must have in order to best support a judge's heavy workload. Jonathan possesses these skills in abundance. Jonathan's work experience prior to law school including at the Legal Aid Society have undoubtedly contributed to his superior case management and organizational skills – assets that will make him a very valuable judicial law clerk.

Lastly, Jonathan's personal attributes make him a terrific colleague. He is empathetic, friendly and a wonderful conversationalist and listener. His positive attitude and energy uplifts those around him, something I, myself, have benefited from countless times. He has earned the admiration and respect of his clinic classmates with his willingness to offer a helping hand, often carrying more of the team's workload in their times of need. I consider Jonathan as a colleague and would count myself as very lucky if I could have the opportunity to work with him again at some point in the future. I wholeheartedly recommend Jonathan for this judicial clerkship. Thank you for your consideration of his application, and please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

Reena Parikh
Assistant Clinical Professor
Director, Civil Rights Clinic
BC Legal Services LAB
Boston College Law School
885 Centre Street
Newton, MA 02459
(617) 552-0283
parikhre@bc.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Candidacy of Jonathan Bertulis-Fernandes

Dear Judge Walker:

It is my great pleasure and privilege to be able to recommend Jonathan Bertulis-Fernandes to you for placement as a Clerk with you and your court. Jonathan is, without any doubt in my mind, one of the best students I have had the opportunity to teach and work with. He is already an excellent legal thinker and practitioner, and will be both an excellent clerk and attorney.

For background and context, I currently serve as an Adjunct Professor of Law and Assistant Director of Campus Ministry at Marquette University; prior to this appointment, I served as a Drinan Scholar and Visiting Lecturer at Boston College Law School. It was during my time at BC that I met Jonathan; he was a student in my first-year Constitutional Law course in the Spring 2022 semester (Jan May 2022). My own academic training includes a J.D. from the University of Wisconsin, an LL.M. with a focus in Law and Religion from Emory University, as well as a Master of Arts in Philosophical Resources (Fordham University) and a Master of Divinity (Jesuit School of Theology of Santa Clara University). With such a background, in addition to multiple academic appointments in law school settings, I have a breadth of experience with students of varying quality and ability. Jonathan is among the best.

I was impressed almost from the beginning of the semester with Jonathan in my class. First-year courses are difficult to stand out in and can be intimidating places. Yet Jonathan from almost the first day was asking questions, offering responses, and engaging in class discussion. While I may have struggled to learn the names and get a sense of all 80-plus students in that class, Jonathan was one I knew and recognized quite quickly. Moreover, his questions and comments demonstrated insight into both the actual cases and legal doctrines we were discussing, as well as the policy and constitutional theory issues behind those doctrines. Indeed, a fundamental component of my own teaching with regard to constitutional law is to explore those more abstract issues of constitutional structure and theory. This is can be a different approach than other courses, particularly first-year courses which focus much more on traditional doctrine and legal fundamentals. Many students find this a difficult academic switch. Jonathan did not. He excelled in the class.

This was particularly impressive given that Jonathan, having grown up and had his initial post secondary education in the United Kingdom, did not always share the background assumptions or knowledge of the constitution that students (or professors!) from the United States take for granted. Almost immediately, Jonathan approached me for resources that would allow him to learn these background principles or assumptions. I offered him a variety of resources. While not overwhelming, this additional task clearly added to the work he had to do, and was something he voluntarily took on. Given that he earned one of the few grades of" A" in my class, he succeeded.

More than just demonstrating academic excellence, though, he demonstrated exactly the kind of self-confidence needed in a successful clerk or lawyer. He was confident enough in his own abilities, and self-aware enough to know where his own intellectual lacunae were, to ask for help. Rather than simply hope to pick up this information by osmosis, or guess at it via contextual clues in cases and class discussions, he asked for the help he needed and the resources that would allow him to succeed. And, even in class, I can recall points where our casebook or my own discussion would assume a student would know how something functioned in American government, and Jonathan would ask me to clarify. In addition to being useful for himself, it was also a great benefit to his colleagues.

This combination of intellectual excellence and self-aware confidence that makes for an excellent lawyer or law clerk (or legal professional generally). When you ask Jonathan to research questions presented in a case or the various arguments made in briefs or arguments, you will receive excellent synthesis and analysis of the materials. Moreover, Jonathan will be able to ask insightful questions about these cases and, perhaps more importantly, about your own instructions for him and expectations. He will be an excellent aid to your work and a fantastic colleague for other staff in your court.

As I have gotten to know Jonathan and his background, I realize that none of this ought to be surprising. Before taking my class, before coming to law school, Jonathan was clearly engaged in working for the public interest and the common good, and was highly successful at that work. Working for The Legal Aid Society, as a Community Councilor, as a local neighborhood advocate, among other work and activities, demonstrates that Jonathan not only understands the doctrines shaping the legal system, but also how that system works to actually improve the lives of individuals and communities. He has been embedded with the legal system in all its various and manifold expressions - legislative, executive, administrative, judicial, as well as public and private. Though the specific contexts may be different, ranging from London to New York to Atlanta to Boston, the active engagement with the law has been consistent.

Again, this is exactly what makes for an excellent lawyer, an excellent clerk, even an excellent professor or judge. Intellectually curious persons can learn legal doctrine and even apply them in various fact patterns. Excellence in the law, though, comes from understanding how the law actually ebbs and flows through the systems, individuals, and institutions, it engages with. Law is not a mystery cult. Understanding this dynamic will allow Jonathan to be among the best clerks and legal professionals.

Nathaniel Romano - romanone@bc.edu

There is no doubt in my mind that Jonathan will be an excellent clerk for you and your court. It is my distinct pleasure to recommend him to you. I am happy to discuss this further with you, if that would be helpful; you can reach me via electronic mail at nathaniel.romano@marguette.edu or by telephone at
(414) 288-4507. Until then, I remain,

Very Truly Yours,

Rev. Nathaniel Romano, S.J., LL.M
Adjunct Professor of Law
Assistant Director of Campus Ministry

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Candidacy of Jonathan Bertulis-Fernandes

Dear Judge Walker:

It is a true honor to write this letter in support of Jonathan Bertulis-Fernandes' application for a judicial clerkship following his graduation from Boston College Law School in May 2024. He is one of the smartest, kindest and most remarkable students I have ever taught (and I have taught more than 2000). He is outstanding in every good and important way, and I recommend him most highly.

I had the privilege of teaching Jonathan throughout his 1L year in BC Law's five-credit skills curriculum, entitled "Law Practice 1 & 2." The program simulates the practice of law by requiring students to function as early-career attorneys, working first as assistant district attorneys, and then as junior associates in private practice. In contrast to doctrinal courses which "go wide" in covering a broad range of topics, Law Practice "goes deep" by focusing on just three simulations for each semester and hammering analysis, analysis, and analysis. In the process, students learn how to construct and communicate a sophisticated written work product for a busy and impatient reader, while also developing superior research skills.

Throughout his year-long Law Practice studies with me, Jonathan consistently demonstrated that he is brilliant, disciplined and absolutely determined to achieve professional excellence. He chose the legal profession to help others and he works hard at law school to equip himself to serve his clients well. Whether an assignment involved an in-depth written analysis or an extemporaneous oral critique of an intractable legal issue, Jonathan never failed to produce a superior work-product. He was always prepared and in command of the material, and his memos were genuinely gratifying to read. His spring semester oral argument of a hyper-technical issue of statutory interpretation was cogent, well organized, carefully reasoned and skillfully delivered. In providing oral and written feedback to his peers, he was critical in the most helpful sense: his comments were insightful, his reasons were well-taken, his suggested revisions were right on the mark and his presentation of the foregoing was encouraging and supportive.

BC students correctly describe their Law Practice coursework as the most challenging and fundamental part of their three years at BC Law. Our LP program is built on increasingly difficult assignments, copious faculty feedback, and ongoing opportunities to re-do, revise and get it right. In this way, the LP curriculum teaches the student to recognize what qualifies as successful analysis and communication, and understand how to reproduce it on a deliberate and consistent basis. Accordingly, when providing written feedback on each of Jonathan's memo assignments, I spent at least 1.5 to 2 hours parsing each line to identify mistakes, explain why they occurred and show how to correct them. I also elaborated on why the suggested revision offered a more effective and efficient approach to serving the reader's need for analytical precision and efficiency – and I provided just as many details in explaining what worked well. Jonathan took that feedback, ran with it in revising prior work, generalized it to newly submitted material, and withstood additional rounds of painstaking feedback. Through this iterative and, for the student, often frustrating process, Jonathan learned how to work for a busy and impatient supervisor who needs and expects him to get to the point, make it, support it and move on. The course frustrates most students and indeed, is designed to do just that. But Jonathan was game for whatever I threw at him because his unavoidable frustration was outweighed by his enduring commitment to professional excellence.

Jonathan's energy and appetite for becoming a great lawyer were not limited to Law Practice. By the close of his 1L year, he had earned a 3.969 GPA. At the conclusion of his 2L fall semester, he reported his grades had "dipped" to a 3.919. These staggering statistics place him solidly at the pinnacle of his class although they do nothing to indicate his enormous personal challenges beyond the classroom. An international student, Jonathan spent much of his 1L year traveling back and forth to London – often on an abruptly scheduled flight - because his father was extremely ill. Jonathan was understandably heartbroken when his father passed shortly before the spring semester's final exams, but he put his head down, focused, worked hard and landed in the top five percent of his class. At the same time, he remained focused on his goal of building a life and career in the United States by studying to become a U.S. citizen. In fact, as I write this letter on February 2, 2023, Jonathan is taking the Oath of Allegiance at Boston's historic Faneuil Hall and receiving his Certificate of Naturalization.

Along the way, Jonathan has had to deal with another challenge that has affected him since childhood: a stutter or, as the Brits would put it, a stammer. Whatever the term, Jonathan has learned not just to manage it but, with his typical blend of discipline and determination, transform it into his very own super power. He describes the process of doing so in a 2016 TedX Talk, delivered while studying as a Bobby Jones Scholar at Emory University. Entitled "The Comfort Zone: An Artificial Barrier," the talk is beautifully composed and movingly spoken. Its content draws on his innate wit and true artistry with words. In this talk, Jonathan bravely details his resolve to transcend the pain and fear of withstanding the hurtful remarks from the latest, ill-informed and judgmental stranger. He begins by educating viewers on the nature of a stammer, and then describes how he came to recognize and eventually embrace the harsh fact that he can neither prevent nor control the hurtful reactions of others. He leans on gratitude for his parents while underscoring the irony of them giving him a nine-syllable name that challenges anyone to pronounce it. Along the way, he invokes Jean Paul Sartre more than once, while doing so with exquisite prose that Sartre himself would envy. For instance, in recounting his decision to push beyond his stammer and reject the inhibitions it carried, he observes that "the

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illusion of control – and it is an illusion – ultimately gets in the way of us truly experiencing life" by acting as an "illusory restraint against the inherent beauty in the unexpected and uncontrollable that we insulate ourselves from - every single day."

Jonathan shared the link to this talk in response to a brief assignment I give at the start of each 1L year. Because I have a poor memory for names, I use this exercise to obtain a few details that will assist in learning names and getting to know those who are about to be stuck with me for the next two semesters. The URL to Jonathan's talk certainly helped me to learn his name; it also made it abundantly clear that I was beyond fortunate to have this unforgettable person walk into my classroom and my life. I have been blessed to work with and get to know Jonathan Bertulis-Fernandes, and I urge you to do the same. Whether or not you decide to interview and ultimately extend a clerkship invitation to him, I urge you to take ten minutes to watch his TedX Talk at:

https://www.youtube.com/watch?v=BSRtEtkg670

I am confident you will be moved and will be better as a result. For these reasons and more, I recommend Jonathan Bertulis-Fernandes most highly and enthusiastically. Please contact me at 508-320-5175 or chirbama@bc.edu if I can be of further assistance. And thank you for considering his candidacy. As I've already stated, he is outstanding in every good and important way.

Most sincerely,

Mary Ann Chirba

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Writing Sample

The attached is a memorandum that I wrote at the end of my 1L second semester as part of the write-on competition for the Boston College Law Review.

The memorandum assignment asked students to argue in favor of a motion to dismiss on the basis of an entrapment defense. The competition was a closed universe that provided students with all of the cases and facts to be used and prohibited the use of any other cases or research. The competition also provided the template.

This memorandum has been edited by only myself.

Bertulis-Fernandes, J – Writing Sample

STATE OF MINNESOTA **COUNTY OF BLUE EARTH**	**DISTRICT COURT** **FIFTH JUDICIAL DISTRICT**
STATE OF MINNESOTA, **Plaintiff,** **vs.** **MICHAEL VARNSEN,** **Defendant.**	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** **File No.: 22-1695**

The Defendant, Michael Varnsen, moves the Court to dismiss the above-captioned complaint charging him with 5th Degree Sale of a Controlled Substance in violation of Minnesota Statute 152.025. Because law enforcement induced Mr. Varnsen to commit the charged offense and the Government has failed to show beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the crime, the Court must dismiss the complaint against the Defendant on the grounds of entrapment.

Pursuant to Rules 26.01 and 9.02 of the Minnesota Rules of Criminal Procedure, the Defendant has waived his right to present the entrapment defense to a jury and now submits the defense to the Court for its determination. To expedite the Court's determination of this motion, the Defendant and the State have stipulated to all facts for the purpose of the motion. The parties have filed the stipulation with the Court.

Because Detective Landry induced Mr. Varnsen to commit the crime with which he is charged and because the State cannot prove beyond a reasonable doubt that Mr. Varnsen was predisposed to commit that crime, this Court must dismiss the complaint against Mr. Varnsen.

STATEMENT OF THE CASE

The facts are undisputed. In 2009, when he was only eighteen, Mr. Varnsen was convicted of a drug possession charge. *Stipulation of Facts ("Stip.")* ¶ 3. At the age of nineteen—in 2010—Mr. Varnsen pleaded guilty to transferring stolen property. *Id.* In the twelve years since, Mr. Varnsen has not had any criminal convictions for drug or other offenses. *Id.* ¶ 1. Mr. Varnsen is now thirty-one years old and works part-time as a mechanic while studying at South Central College. *Id*. He is only six credits short of an associate's degree in electronics. *Id.*

On March 21, 2022, Mr. Varnsen was standing with another person outside of an apartment building at 1638 Moreland Avenue, Mankato, Minnesota when Detective Daniel Landry of the Mankato Police Department approached him. *Id.* ¶¶ 5–8. An informant had told Detective Landry that marijuana was being sold nearby. *Id.* ¶ 5. Detective Landry asked Mr. Varnsen and the other individual: "Either you guys know where I can get some weed?" *Id.* ¶ 8. Mr. Varnsen replied that he did not know where Detective Landry could get marijuana. *Id*. Detective Landy repeated this question and Mr. Varnsen replied for a second time that he did not know anything about marijuana being sold nearby. *Id.* Detective Landry then walked away from Mr. Varnsen and left the immediate area. *Id.* ¶ 9.

Some forty-five minutes later, Detective Landry again approached Mr. Varnsen and asked him for a third time whether he could sell him marijuana. *Id.* ¶ 12. Mr. Varnsen replied again that he did not know anything about the sale of marijuana. *Id.* Detective Landry then proceeded to ask a fourth time, saying: "My friend told me he just got some down here. Look, I just finished an intense deployment. I need the weed for PTSD. You gotta help me out." *Id.* Mr. Varnsen replied, again, that he was not involved in selling marijuana. *Id.* By this point, Detective Landry had asked Mr. Varnsen about buying marijuana some four times across two separate

instances. *Id.* ¶¶ 8–12. Detective Landry then asked a fifth time, claiming: "Come on, I've been through a lot in the past seven months. I really need it. You must know someone you can call who has something. You gotta help me out." *Id.* ¶ 12. This time, Mr. Varnsen told him he potentially knew "another vet" who could help him and made a phone call. *Id.* ¶¶12–13.

Mr. Varnsen walked with Detective Landry for approximately four blocks to another apartment building at 1215 Moreland Avenue, Mankato, Minnesota. *Id.* ¶ 14. Mr. Varnsen then gave Detective Landry a bag containing seven grams of marijuana in exchange for $80. *Id.* ¶¶ 15–17. Detective Landry then placed Mr. Varnsen under arrest. *Id.* ¶18. Mr. Varnsen was subsequently charged with 5th Degree Sale of a Controlled Substance in violation of Minnesota Statute 152.025. *Id.*

ARGUMENT

The charges should be dismissed because Mr. Varnsen was entrapped by Detective Landry. Mr. Varnsen was entrapped by Detective Landry because: (1) the preponderance of evidence demonstrates that the Government induced Mr. Varnsen to commit the charged offense, and (2) the State has failed to meet its burden of demonstrating beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the offense of selling marijuana.

I. The Defense of Entrapment Prevents Wrongful Convictions by Ensuring That Defendants Who Were Induced to Commit a Crime and Otherwise Not Predisposed to Commit the Charged Offense are Not Convicted.

Detective Landry entrapped Mr. Varnsen because he induced Mr. Varnsen to sell marijuana and Mr. Varnsen was not otherwise predisposed to commit the charged offense. *See Stip.* ¶¶ 8–20. Under the "subjective approach" to entrapment followed in Minnesota, a government agent unlawfully entraps a defendant when they induce a defendant to commit a charged offense and the defendant was not otherwise predisposed to commit the offense prior to

interaction with law enforcement. *See State v. Grilli*, 230 N.W. 2d 445, 451–54 (Minn. 1975). To assert an entrapment defense successfully, the defendant must first show by a preponderance of evidence that the Government induced the defendant to commit the crime. *See State v. Johnson*, 511 N.W. 2d 753, 754 (Minn. Ct. App 1994). The burden then shifts to the Government to show beyond a reasonable doubt that the defendant was predisposed to commit the charged offense prior to first interacting with the Government. *Id.* These two elements ensure that only individuals that do not have original criminal purpose—and not those who were merely provided an opportunity by the Government to commit a crime that they were already inclined to commit—may avoid conviction by asserting entrapment. *See State v. Potter*, No. CX-97-1147, 1998 WL 171346, at *2 (Minn. Ct. App. Apr. 14, 1998).

The defense of entrapment is a key protection afforded defendants in the State of Minnesota and ensures that only individuals who actually intended to commit a charged offense are convicted of a crime. *See State v. Poague*, 72 N.W. 2d 620, 624 (Minn. 1955). The entrapment defense prevents otherwise law-abiding individuals from being wrongly convicted as a result of over-zealous law enforcement practices. *See Grilli*, 230 N.W. 2d at 451–52; *Poague*, 72 N.W. 2d at 624.

II. The Court Must Grant Defendant's Motion to Dismiss on Grounds of Entrapment.

A. The Government Induced Mr. Varnsen to Commit the Charged Offense.

The Government induced Mr. Varnsen to commit the charged offense because Detective Landy repeatedly harassed and pressured Mr. Varnsen into selling him marijuana. *See Stip.* ¶¶ 8–20. To demonstrate that the Government induced a crime, a defendant must show that the Government actively persuaded and pressured the defendant and did more than simply provide them with an opportunity to commit a crime. *See State v. Olkon*, 299 N.W. 2d 89, 107–08 (Minn.

1980). Government inducement requires "something in the nature of persuasion, badgering, or pressure by the state," where the Government's actions go further than necessary to produce evidence of criminality and instead actively pressure the defendant into committing a crime. *Olkon*, 299 N.W. 2d at 107; *see Grilli*, 230 N.W. 2d at 452 (holding that entrapment occurs when a defendant is "lured . . . into committing an offense which he otherwise would not have committed and had no intention of committing."). While merely soliciting a crime is not sufficient to show inducement, repeated solicitation by the Government *does* show that it induced a crime because this demonstrates that the defendant's original inclination was to not commit the crime prior to being pressured by the Government. *See Johnson*, 511 N.W. at 755.

Mr. Varnsen provided Detective Landry with marijuana only after Detective Landry asked him about the sale of marijuana some five times and approached him on two separate occasions. *Stip.* ¶¶ 8–19. In *State v. Johnson*, the Government induced a defendant caught in a law enforcement "reverse sting" to commit drug trafficking offenses when police officers continued to press their offer to sell him drugs after he had initially refused to buy them. *See* 511 N.W. 2d at 755–56. As the court explained in *Johnson*, inducement occurs when a government agent continues to pressure and encourage someone to commit a crime after they have already refused to do so and shown that their original inclination was not to commit the charged offense. *Id.* Detective Landry's repeated solicitation and harassment induced Mr. Varnsen to sell marijuana because, like in *Johnson*, Detective Landry repeatedly solicited him to sell drugs despite his refusals. *Stip.* ¶¶ 8–19; *see* 511 N.W. 2d at 755–56. During Detective Landry's repeated solicitations, Mr. Varnsen repeatedly refused to commit the charged offense—stating multiple times that he was not involved in selling marijuana. *Stip.* ¶¶ 8–18. Despite Mr. Varnsen's repeated refusals, Detective Landry refused to accept his answers and continued to